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ADOLESCENT ROMANTIC RELATIONSHIPS AND THE DILEMMA OF CONSENT UNDER POCSO ACT

Prof. (Dr.) Sudhansu Ranjan Mohapatra*

Lalitendu Debata**

Abstract: In India, POCSO Act is the legislation which protects children from unwarranted sexual exploitations and sexual assault and safeguards their interest. The Act is gender neutral and fixes the age of consent to be 18 years for indulging in any kind of sexual activities. But the age of consent cannot be equated with the age at which adolescents between the age of 16 to 18 attain the capability of taking decisions including their right to sexual autonomy and exploring their sexual interests. This results in circumstances when the difficulty arises where two adolescents indulge in sexual activities, the girl is being treated as a victim and the boy is treated as an accused which defies the objective of POCSO Act being gender neutral. The tug of war for reducing the age of consent has seen the proponent being the Higher Judiciary of India advising the Legislature repeatedly to consult on reducing the age of consent. This paper explores the challenges faced by the adolescents and recommends certain amendments to overcome this problem faced by adolescents under the POCSO Act.
Keywords: Adolescent, sexual autonomy, POCSO Act, age of consent.

Introduction:

When the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act) came into force, the ambit of offence of "rape" as then defined under the Indian Penal Code, 1860 (IPC) got expanded to cover not only penile-vaginal penetration, but penetration by any other part of the body and objects into specified orifices of the child, and the offence was termed as, "penetrative sexual assault". In a subsequent amendment, the legislature raised the "statutory age of rape" or "the age of consent to sexual activity" from sixteen years to eighteen years, and omitted the discretion given to Courts to impose a punishment of less than the minimum statutory sentence. Though, such new dimension of penetrative sexual offence was applauded by child rights activists, the increase in the age of consent was met with a divided response, some for it, and others, against it.

The POCSO Act was amended in 2019, when the minimum mandatory sentence for penetrative sexual assault and aggravated penetrative sexual assault and aggravated penetrative sexual assault was increased to ten years and twenty years, respectively, with an addendum that the punishment for aggravated penetrative sexual assault "may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death." Consequent to this amendment and the taking away of the Court's discretion in the context of sentencing, upon conviction, an offender will perforce undergo imprisonment for a period of ten years or twenty years, at the minimum.[1]

It has been eleven years since the enactment of the POCSO Act. It is necessary to reassess the impact of raising the "age of consent", as also, whether

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[1] https://www.scconline.com/blog/post/2023/03/12/age-of-consent-under-the-pocso-act/ (last accessed on 25.05.2023 at 08:51 P.M.)

the POCSO Act has increased the reporting of sexual offences against children and enhanced the conviction rate.

Objective of the Legislation:

POCSO Act was enacted to comprehensively deal with crimes of sexual assault against children. The legislation was drafted with a view to protect and safeguard children from sexual offences. The goals that were attributed with this Act were to protect the children so that he/she doesn't feel a sense of discomfort or fear and to create a child-friendly atmosphere.[2] This legislation in its spirit was enacted to secure the best interest and well-being of the children.

Age of Consent:

Age of consent can be stated to the age which the law recognises that a person is able to make decisions regarding certain acts recognised by law. Since the 19th century, age of consent laws has been marked by shifts in the understanding of childhood, adolescence and adulthood, propelled by developments in the rights of women and children, as well as socio-cultural and political factors. The past legislative provisions have reflected colonial and patriarchal understanding of females as properties of their father or their husband.[3] In India, the age of consent was often related with the age of marriage, and social reformers often sought to increase the age of consent, with the explicit aim of raising the age of marriage.[4]

In 1860, the Indian Penal Code stated 10 years as the age of consent for both married and unmarried girls.[5] In 1889, the death of Phulmoni Dossee, a 10-year-old girl in Calcutta, after her much older husband consummated the marriage,[6] it urged the legislators to raise the age of consent for sexual intercourse to 12 years with the intention of protecting "female children from immature prostitution and from premature cohabitation". In 1925, the age of consent was further raised to 14 years for girls and 13 years for rape within marriage. In 1940, it was again changed to 16 years and to 15 years for marital rape. For 72 years, the age of consent for sexual intercourse was fixed at 16 years, until the POCSO Act, 2012 changed it to 18 years. The POCSO Act is gender neutral and as a first legislation, introduced an age of consent for children of all genders. Significantly, when it was first introduced in the Rajya Sabha, the POCSO Bill, 2011[7] recognised the possibility of consensual sexual activity with a child between 16-18 years and specified grounds such as the use of force, violence, threats, intoxicants, drugs, coercion, fraud, and others, in the

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[2] Alakh Alok Srivastava v. Union of India, W.P. (C) No. 76 of 2018.
[3] Matthew Waites, The age of consent: young people, sexuality and citizenship Basingstoke: Palgrave Macmillan (2009), p.62.
[4] Amita Pitre & Lakshmi Lingam, "Age of consent: Challenges and contradictions of sexual violence laws in India", Sexual and Reproductive Health Matters, 29:2.
[5] Government of India, Report of the Age of Consent Committee, 1928–1929, Central Publication Branch, 1929.
[6] Subhashri Ghosh, "Coming of Age in Colonial India: The Discourse and Debate over the Age of Consummation in the Nineteenth Century" in: K. Moruzi and M. J. Smith, ed., Colonial Girlhood in Literature, Culture and History, 1840–1950, London: Palgrave Macmillan (2014), p.87.
[7] The Protection of Children from Sexual Offences Bill, 2011, as introduced in the Rajya Sabha.

presence of which consent would be vitiated.[8] The Ministry of Women and Child Development (MWCD) justified the exception on the ground that the law cannot be blind to social realities and criminalisation of adolescents for such acts would be detrimental.[9] However, following concerns raised by the Parliamentary Standing Committee (PSC), that the exception would inevitably shift focus on the conduct of the victim during trial,[10] it was withdrawn when the Bill was placed before Parliament.

In 2013, despite the recommendations by the Justice Verma Committee that the age of consent be reduced to 16 years, Section 375, IPC was amended and the age of consent was increased to 18 years. Where two underage minors are involved in a sexual relationship, the Juvenile Justice (Care and Protection of Children) Act, 2015 is applicable with the possibility of a child above 16 years being tried as an adult for heinous offences.[11] In 2018, the marital rape exception in the IPC, as per which sexual intercourse by a man with his wife not below 15 years would not constitute rape, was read down by the Supreme Court of India for being unconstitutional and violative of the rights of children and the POCSO Act.[12] Thus, although a child marriage is valid under personal law and the Prohibition of Child Marriage Act, 2006, except in certain circumstances, sex within such a marriage constitutes rape or aggravated penetrative sexual assault. In 2019, following gruesome incidents of sexual violence against children, the minimum punishment for penetrative sexual offences under the POCSO Act was enhanced,[13] and the death penalty was introduced for aggravated penetrative sexual assault.

Comparative Analysis of Age of Consent among Different Countries:

Age of consent differs from countries to countries and vary worldwide. Majority of the countries requires young ones to be at least 14 before indulging into establishing sexual relationships. Certain Countries also have the Romeo and Juliet clause which doesn't make it illegal for young partners within a certain age gap to have sexual relationship.[14]

European Countries-Most of the European countries set 16-17 to be the age of consent while several others such as Malta and Vatican City sets the age of 18 as lawful age for young partners to legally enter into sexual relationships. Countries including Austria, Italy, Serbia, Germany, and Portugal are amongst the countries which have made the age of 14 as the statutory age to have lawful sexual relationship.

Germany-German Empire's Criminal Code[15] have made the age of 14 as the statutory age for entering into a sexual relationship. Prosecution for rape can

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[8] Proviso to Clause 3, The Protection of Children from Sexual Offences Bill, 2011, as introduced in the Rajya Sabha.

[9] Department-related Parliamentary Standing Committee on Human Resource Development, 240th Report on The Protection of Children from Sexual Offences Bill, 2011, 21 December 2011, para 6.7.

[10] Ibid, para 6.6.

[11] Juvenile Justice (Care and Protection of Children) Act, 2015, §§ 15, 18(3).

[12] Independent Thought v. Union of India, AIR 2017 SC 494.

[13] POCSO (Amendment) Bill, 2019, Statement of Objects and Reasons.

[14] https://worldpopulationreview.com/country-rankings/age-of-consent-by-country (last accessed on 27.05.2023 at 1:29 P.M.)

[15] The Criminal Code of the German Empire, 1871.

result in 6 months to 10 years of jail time. The age of consent shall be 14 and if both partners are under the age of 18, they shall not be prosecuted if the relationship is a consensual one. In fact, a person who is above the age of 21 may also engage in sexual activity with a person above the age of 14 but less than 16 years of age only if the younger partner's lack of capacity for sexual self-determination is not exploited.

France-Article 227-25 of the Penal Code[16] determines the age of consent in France to be 15 years. Statutory rape is punishable by up to 5 years of age and a fine of €75,000. France also has a Romeo and Juliet clause which doesn't make a person liable for prosecution when a person under the age of 15 has sexual intercourse with someone who is within five years of their age.

United States of America-The age of consent in USA varies from 16 to 18. Thirty-one states set the age of consent as 16, eight states declare it to be 17 and eleven set it as 18. As many as twenty-six states have "Romeo and Juliet" laws or close-in age laws, legalizing sexual intercourse between minor and adolescent partners are close enough to one another in age.

For example, in Colorado, the age of consent is 17 years old, but those younger than 15 may consent to a partner who is less than four years older, and those aged 15 or 16 may consent to a partner who is up to 10 years older. By comparison, Arizona law sets the age of consent at 18, but allows teens aged 15-17 to consent to sex with partners who are no more than 24 months older.

United Kingdom-The age of consent in United Kingdom is 16 years old. The territories of UK have their own local age of consent laws but at present all of the territories have set the age of consent to be 16. However, United Kingdom doesn't have the close-in-age exemptions.

Australia-Almost all of the territories in Australia have set the age of consent to be 16 only with Tasmania and South Australia being the exception by raising the age of consent to 17 years. Several jurisdictions in Australia also have the close-in age exemptions, which also vary depending upon the territory.

Adverse Impact Faced by Adolescents:

The unrecognition of consensual sexual behaviour of adolescents has resulted in their *suo motu* criminalisation, as well as a blend of consensual acts with non-consensual acts. While all children and adolescents are entitled to protection from sexual exploitation and violence, the approach which the POCSO Act undertakes renders adolescents vulnerable to criminal prosecutions for normative sexual behaviour. This section examines the implications of such criminalisation on their right to dignity, personal liberty, privacy, health, and their best interests and the impact on the justice system.

Adolescents' Right to dignity and privacy undermined-Article 21 of the Constitution of India makes Right to dignity and one's privacy a fundamental right and makes it explicit that it need not be meddled with. Children and Adolescent are entitled to any form of discrimination and protection from forceful sexual exploitation but in the advent of the same their consensual acts are brought in to the purview of crime where two adolescents when indulged in

[16] The French Penal Code, 1810.

private non-exploitative and consensual sexual activities are termed as victim and accused and have to face the rigours of POCSO Act.

In *Anoop v. State of Kerala*,[17] while dealing with a bail application, the Kerala High Court remarked about the faulty conflation of consensual acts involving adolescents with rape:

> *"Unfortunately, the statute does not distinguish between the conservative concept of the term rape and the sexual interactions arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all 'intrusions' on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims."*

The criminal trial, investigation and inquiry about two adolescents in consensual sexual activities terrifies them and degrades their self-esteem, confidence and bodily expression and inflicts a disgrace on the adolescents. It hampers their dignity and ignores all the cultural aspects. In the Indian context, the criminalisation of consensual sex among or with adolescents in not in consonance with their sexual development, bodily integrity and autonomy, and desires for attachments and relationships, undermines their fundamental right to life, privacy, and dignity.

Adolescents' liberty is being deprived of-While the object of the POCSO Act has been to protect the children and minor from the rigours of unwanted and forceful sexual activities, its unintended effect has been the deprivation of liberty of the adolescents. In *Rama v. State*,[18] the 20-year-old accused in a "romantic" case was in judicial custody for 18 months. While quashing the case, the Karnataka High Court observed that the criminal process itself inflicted pain on the parties and despite an acquittal, "the sword of crime would have torn the soul of the accused." In stray cases, a strict view that the consent of a minor is irrelevant, coupled with the lack of sentencing discretion, has resulted in the imposition of high minimum mandatory sentences such as 10 years for engaging in consensual sex.[19] With the amendment in 2019, such cases will attract a higher minimum sentence of 20 years if it is a case of repeated sex, or if it has resulted in a pregnancy.

The law also undermines the identity of adolescent girls by un-dimensionally casting them as "victims", rendering them voiceless, and without any agency to enter into relationships or choose their partners. Adolescent boys, on the other hand, are discriminatorily treated as children in conflict with the law,[20] and can even be tried as adults. The liberty of adolescent victim-girls is compromised as they are institutionalised in Children's Homes when they refuse to return to their parents and insist on being with their partner. A study on their plight reveals that "they are shamed, humiliated, and stigmatised for their acts, alienated from their partners and society, and at times not released even after they turn 18. Such institutionalisation harms their physical and mental health, as well as overall development, and they have little or no recourse to challenge or

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[17] Bail Appl. No. 3273 of 2022 decided by the Kerala High Court on 08.06.22.
[18] Crim. Pet. 6214 of 2022, decided by the Karnataka High Court on 2.08.2022.
[19] State of Gujarat v. Ashokbhai, 2018 GLH 792 [Guj HC].
[20] ICCW, Children apprehended under POCSO Act for Elopement in Tamil Nadu (2017), UNICEF, p.40.

seek review of such decisions."[21] Administrative confusion about whether the girls should be released by the court or Child Welfare Committees prolonged their detention even after many of them had attained majority.[22] Girls who are pregnant or have given birth to a child are compelled to reside in a Children's Home where access to sexual and reproductive health services and familial care is limited.[23]

Adolescents' right to choose is compromised- In *X v. Principal Secretary, Health & Family Welfare Department*,[24] the Supreme Court observed that there is a conflict between the POCSO Act, the privacy obligation under the Medical Termination of Pregnancy Act, 1971, and the reproductive autonomy of minors. It clarified that in the case of minors below 18 years engaging in consensual sexual activity and seeking a termination of pregnancy, the registered medical practitioner (RMP) "only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act." The apex court also clarified that the RMP will be exempt from disclosing the identity of the minor in criminal proceedings which may ensue based on the RMP's report under Section 19. While this is a step towards ensuring their access to termination services, cases of adolescents in a consensual relationship who wish to retain the pregnancy will continue to be reported.[25]

In *State of Maharashtra v. Mohsin Basuddin Pakhali*[26], a young couple sought medical care for their pregnancy and after the girl confirmed she was 18 years, the doctors provided treatment until her delivery. Following an inspection of the records by an Officer from the Central Adoption Resource Authority and members of the Child Welfare Committee to verify pregnancy treatments sought by young women of 18-19 years, the hospital staff was directed to procure age proof of the girl. The Aadhar card revealed that she was a minor when she accessed treatment and based on the direction of the Inspection Committee, an FIR was lodged by the doctor. The case, however, ended in an acquittal as the girl did not say anything incriminating against the accused and her minority could not be established.[27]

The accused's lack of intention to sexually assault the victim was also considered in cases that ended in acquittal. Similar trends were observed in other studies wherein the accused in "romantic" cases were acquitted as the victim was "mature enough to understand the nature and consequences of her actions"; the victim "was capable of consenting"; or due to the lack of culpable mental state of the accused person. In a few romantic cases, the Special Courts noted elements of exploitation and misrepresentation, particularly where the victim was under 16 years, taking into account the possibility of exploitation and

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[21] Mehendale Raha (et.al.), Girls Involved in "Romantic Cases" and the Justice System: A Study Based on the Experience of Girls in Child Care Institutions in Bihar, Enfold Proactive Health Trust (2021) 223.
[22] Ibid, p. 224.
[23] Ibid, p. 225.
[24] Civil Appeal No 5802 of 2022, decided by the Supreme Court on 29.09.22.
[25] Swagata R. and Shruthi R., Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief, p.12.
[26] Special Case POCSO No. 24/2019, decided on 20/07/2019 by the Special Court in Kolhapur (Maharashtra).
[27] Supra note 24, p.16.

grooming, and convicted the accused. Overall, the evidence categorically points to the consideration of social realities of teenage sexuality by Special Courts.[28]

Way Forward-

The age of consent for establishing sexual relationships is very different from the age of making a decision by the adolescents. When the sexual activity between two consenting adolescents has not been recognised by the penal laws of India, it leads indirectly to criminalisation of consensual activities. Hence, certain remedies are prescribed to remedy the indirect discrimination made to the adolescents.

1. The age of consent under POCSO Act and IPC should be amended to reduce it to 16 years of age.
2. A "Romeo-Juliet" clause of close-in-age gap concept should be introduced under POCSO Act.
3. The consensual and non-exploitative sex should be decriminalised.
4. New guidelines should be introduced to deal and investigate cases arising out of romantic relationships or elopement cases.
5. There should be introduction of safe sex education in the syllabus of schools for adolescents.
6. Social awareness should be spread among the adolescents regarding safe sex procedure and the provision of information and services such as pregnancy care and abortion, as well as diagnostic services for HIV, STIs, and pregnancy are not hindered by the mandatory reporting obligation under the POCSO Act.

Concluding Observations:

Exploring one's sexual aspect and indulging in sexual activities with a romantic partner are normal aspects of development of adolescents. In India, the indirect criminalisation of this aspect coloured by the complexity of social stigmas serves as a bias against the basic rights of the adolescents. The age of consent under POCSO Act and the penal laws remains a tug of war especially when the proponents being the Higher Judiciary of the Country. Unfortunately, in between all these, the real intent of POCSO Act is failing which is to protect children from sexual assaults. Thus, it's high time that the Legislature should look upon the rights of the adolescents and amend accordingly the POCSO Act in order to protect the best interest of the children and allowing them to rightfully exercise their choice in terms of exploring in consensual sexual interests and protect themselves from unwarranted exploitations.

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[28] Ibid.

WITHDRAWAL OF CRIMINAL CHARGES: INDIAN LAWS AND PRACTICES

Dr. P. K. Pandey*

Ishani Dwivedi**

The Court, while considering the application under Section 321 CrPC, is required to consider whether the withdrawal from prosecution would further cause of justice or not and, whether it would be in the interest of justice to allow the withdrawal from prosecution. The application should show that the Public Prosecutor has applied his independent mind, on the basis of the material placed before him, including the evidence collected by the prosecution during the course of investigation.

-Allahabad High Court[1]

Abstract: The provisions of withdrawal of criminal charges are directly related with the sovereign power of the State which empowers it to continue or withdraw a criminal proceeding in the interest of justice. This power is exercised by the State through its Public Prosecutor who exercises his discretion in tune with serving the interest of justice and accordingly, if the request to withdraw criminal proceeding is accepted by the respective court, such charges are withdrawn. This paper deals with the legal provisions relating to withdrawal of criminal charges in India. Further, it gives some sensible suggestions also.

Keywords: Crime, Criminal Law, Prosecution, Charge, Withdrawal.

Introduction:

In every society, the people have been expected to live peacefully, maintaining their respect and dignity, without causing any undue interference with others. At the same time, the State has been established to safeguard the rights of every person and provide such environment wherein every person can enjoy his life, liberty and freedoms in addition to provide a feeling of being safe, secure and protected which will further ensure their all-round development. The State, to discharge its obligations, has established its agencies like the Legislature, the Executive and the Judiciary which function for the public good. The State, being the guardian of its people, has taken responsibility to reward the honest and law-abiding people and prevent such incidents which are against the public interests. The commission of a crime is thought to be against the State, hence the State is supposed to cause fear of law in the violators of law by punishing them, following the fair procedure of criminal justice system which, in turn, will increase faith of common people in judicial system and credibility of the State. The State, without any fear or favour, must take effective steps so that repetition of crimes may be prevented and for this purpose the agencies of State function in tune with constitutional mandate to serve the interest of justice. When the State, to fulfil its political or other interests, decides not to continue a criminal prosecution and attempts to withdraw it without any proper reason, undoubtedly, it does not only impact the public life rather it tarnishes the efficiency and image of our criminal justice system including the credibility of

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[1]*State of U.P. v. Rakesh Kumar Verma*, Criminal Revision No.-275 of 2021 on 11 July, 2022 (Allahabad).

investigating agencies and judicial system which finally sends a message to the common people that there are ways to escape from the clutches of law and legal system in nexus with political influence.

Withdrawal of Criminal Charges:

The crimes, in any society, are thought to be committed against the State and the State, being the chief stakeholder of the criminal justice system, has been authorised to institute criminal proceedings through its executive organ (police), continue its trial in the courts with the help of its officers (judges, advocates and public prosecutors) for delivering justice to the accused as well as the victims. At the same time, this is prerogative of the State to continue a criminal proceeding or withdraw it due to certain reasons intended for achieving the public interests and interests of justice. The power to withdraw a criminal case is also known as *nolles prosequi.* In Indian criminal justice system, the prosecution, appeal and other proceedings on behalf of the government are conducted by the Public Prosecutor[2] who is thought to be independent officer of the court, free from any type of pressure of the government. He is responsible and answerable to the court.

The provisions relating to withdrawal of prosecution are contained in section 321 of the Criminal Procedure Code (CrPC), 1973. Prior to the CrPC, 1973 it was contained in Section 494 of the Code of Criminal Procedure, 1898[3]. Section 321 CrPC is as under-

> *321. Withdrawal from Prosecution.*—The Public Prosecutor or Assistant Public Prosecutor in-charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—
>
> (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
>
> (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:
>
> *Provided* that where such offence—
>
> (i) was against any law relating to a matter to which the executive power of the Union extends, or
>
> (ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or
>
> (iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or
>
> (iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,
>
> and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the

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[2] Criminal Procedure Code, 1973 (Act 2 of 1974), s. 24.

[3] *Effect of Withdrawal from Prosecution*- Any Public Prosecution may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if is made after a charger has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

> Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

It is evident from the above that a Public Prosecutor or Assistant Public prosecutor in-charge of a criminal case is authorised to withdraw from the prosecution with consent of the court. Where the court does not consent for withdrawal, the prosecution cannot be withdrawn. The essential ingredients of section 321 CrPC may be extracted as under-

(a) The power to withdraw from prosecution is vested only with the Public Prosecutor 'in-charge of the case' with consent of court.
(b) The withdrawal from prosecution may be of any person either generally or in respect of any one or more of the offences for which he is tried.
(c) The withdrawal may be at any time before pronouncement of the judgement.
(d) Where the prosecution is withdrawn-
    (i). before framing of charge, the accused is discharged from the offence.
    (ii). after framing of charge or where no charge is required to be framed, the accused is acquitted from the offence.

If the withdrawal of prosecution is related with any such offence which is related with executive power of the Union Government etc., as mentioned above, only the Public Prosecutor who is appointed or permitted by the Central Government has authority to withdraw such prosecutions.

Grounds of Withdrawal of Criminal Charges:

Section 321 CrPC does not specify any grounds or circumstances wherein the prosecution may be withdrawn by the Public Prosecutor. Hence, naturally two questions are raised in this respect-Firstly, what are the grounds on which the Public Prosecutor in-charge of the case may apply for withdrawal from the prosecution? And Secondly, at the same time, what are the considerations which must weigh with the Court in granting or refusing consent for the withdrawal from the prosecution? In this respect, Calcutta High Court[4] noted that "the legislature not having defined the circumstances under which a withdrawal is permissible, it would not be right to attempt to lay down any hard and fast rule, circumscribing the limits within which a withdrawal may be made."

Supreme Court has also observed that "the paramount consideration in all these cases must be the interest of administration of justice. No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of justice."[5]

In respect of both questions, there are various decisions delivered by the Supreme Court. In some cases, the Court took broader view while in others it adopted narrow view and because of this, uniform approach could not develop.

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[4] *Giribala Dasi v. Mader Gazi*, AIR 1932 Cal 699.
[5] *State of Orissa v. Chandrika Mohapatra,* 1977 SCR (1) 335.

In *Sheonandan Paswan v. State of Bihar & others*[6], the Supreme Court of India has correctly mentioned the examples of public interest as under-

> "In our opinion, the object of Section 321, Cr. P.C. appears to be to reserve power to the Executive Government to withdraw any criminal case on larger grounds of public policy such as inexpediency of prosecutions for reasons of State, broader 'public interest like maintenance of law and order, maintenance of public peace and harmony, social, economic and political; changed social and political situation; avoidance of destabilization of a stable government and the like. And such powers have been, in our opinion, rightly reserved for the Government, for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country? The Court is not in a position to know such situations."

This case is undoubtedly a landmark judgment on the scope of Section 321, CrPC and laid down the roadmap for the public prosecutor as well as the court[7].

Hon'ble Supreme Court in *Subhash Chander v. State (Chandigarh Administration)*[8] mentioned the grounds of withdrawal of criminal charges as under-

> "The promotion of law and order is an aspect of public justice. Grounds of public policy may call for withdrawal of the prosecution. A prosecution discovered to be false and vexatious cannot be allowed to proceed. The grounds cover a large canvas. But the power must be cautiously exercised, and the statutory agency to be satisfied is the Public Prosecutor in the first instance, not the District Magistrate or other executive authority. Finally, the consent of the court is imperative."

In *State of Orissa v. Chandrika Mohapatra*[9], the Court said that "we cannot forget that ultimately every offence has a social or economic cause behind it and if the State feels that the elimination or eradication of the social or economic cause of the crime would be better served by not proceeding with the prosecution, the State should clearly be at liberty to withdraw from the prosecution".

In *State of U.P. v III Additional District & Sessions Judge*[10], an application by the Public Prosecutor seeking withdrawal from the prosecution of Phoolan Devi in more than 55 cases was filed before the court which was rejected on the ground that it does not serve the public interest. Thereafter, the State of U.P. filed revision in the Allahabad High Court which commented as under-

> "… the Prosecutor has to take an independent decision as to whether he should withdraw from the prosecution or not. That is, he cannot be dictated by any other authority, including the State, to move an application for withdrawal. It further means that whether withdrawal should be made or not, has to be considered first by prosecutor

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[6]1983 SCR (2) 61.
[7]*Afjal Ali Sha v. State of West Bengal*, W.P.A. No. 6315 of 2021 on 2 August, 2022 (Calcutta).
[8](1980) 2 SCC 155.
[9] 1977 SCR (1) 335; See also: *Sher Singh v. Jitendranath Sen*, AIR 1931 Cal 607.
[10] 1997 CriLJ 3021 (Allahabad).

> himself whether in a particular case the accused deserves such treatment or not. After concluding in affirmative, he moves an application before the court. Then the onerous job of the court starts as to whether it will be in the public interest and in the interest of administration of justice that consent should be granted or not. Then a judicial discretion has to be exercised by the court, which should not be arbitrary; because arbitrariness is an anathema in a civilized and democratic society. The meaning is quite clear that the decision cannot be taken by the Prosecutor casually. Similarly, the court cannot grant consent in a routine and clumsy manner and the court cannot act like a post office. Therefore, two responsible authorities are involved, the prosecutor and the Court and they have to act according to their judicial discretions in accordance with law and for serving a larger interest of society, which is called' public interest."

In *State of Punjab v. Union of India*[11], Hon'ble Supreme Court said that "the ultimate guiding consideration while granting a permission to withdraw from the prosecution must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to withdraw. The Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice, and such broad ends of public justice may well include appropriate social, economic and political purposes."

In *Rahul Agarwal v. Rakesh Jain and another*[12], the Supreme Court held that "if the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution."

Permission at any Stage:

It is evident from section 321 CrPC that the permission to withdraw prosecution may be granted by the court at any stage of the case before its judgement is pronounced.

Calcutta High Court in *Sher Singh v. Jitendranath Sen*[13], said that the Public Prosecutor may apply to withdraw from the prosecution at any stage of the case so long as the judgment is not pronounced… and it is quite independent of the possibility that at the time of the application the Court has come to the conclusion that the prosecution case is true and that the accused has committed the offence. In a suitable case the Court may still give its consent to the Public Prosecutor to withdraw from the prosecution if it finds that there are good reasons for doing so. Consent is not to be given as a matter of course, neither is it to be unreasonably withheld.

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[11]AIR 1987 SC 188.
[12](2005) 2 SCC 377.
[13]AIR 1931 Cal 607; See also: *M.N.S Nair v. P.V Balakrishnan*, AIR 1972 SC 496.

Procedure of Withdrawing the Criminal Charges:

The procedure of withdrawal from prosecution involves mainly the State, the Public Prosecutor and the court which have been assigned distinct responsibilities in Indian criminal justice system. In sum, withdrawal from prosecution is instructed by the State, the Public Prosecutor has to file application which has to be consented by the court.

Role of Public Prosecutor in Withdrawing Criminal Charges-The Public Prosecutor is appointed by the Government to conduct the criminal or other proceedings on behalf of the Government, hence it is clear that he cannot act without instructions of the Government as stated by *Baharul Islam, J.*[14] He noted that Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. Thus, it is evident from the above statement that he receives instructions from the Government to withdraw from prosecution and apply his own discretion regarding the suitability of filing application for receiving consent of the court. In other words, it may be said that the Public Prosecutor, having the duties towards the court, the state and the accused, is under obligation to take into his account all the relevant aspects of the case and decide whether the prosecution should be withdrawn or not? He is under legal duty to be neutral, fair and objective while discharging his functions. He has not been expected to take decision as per Government's irrelevant instructions rather he has to apply his own mind.

Supreme Court of India in *Sheonandan Paswan v. State of Bihar & others*[15], ruled that "though it is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the Court's supervisory function. In fact, being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action."

In *Balwant Singh v. State of Bihar*[16], the Supreme Court observed that "the statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution."

In *S.K. Shukla v. State of U.P.*[17], the Supreme Court held that "the Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the *prima facie* case is made or not. The court, if satisfied, can also reject the prayer."

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[14]Quoted in: Supra note 6.
[15]Supra note 6.
[16]AIR 1977 SC 2265.
[17](2006) 1 SCC 314; See also: *Vijaykumar Baldev Mishra v. State of Maharashtra,* (2007) 12 SCC 687.

A unique case of misuse of power by the Public Prosecutor came before the Madras High Court in *State v. L. Ganesan*[18], wherein firstly the Public Prosecutor withdrew a criminal prosecution and after change of ruling party in the State's governance, the same Public Prosecutor approached the court to initiate re-prosecution. Dismissing the petition, the Madras High Court expressed its displeasure regarding the role played by the Public Prosecutor as under-

> "The withdrawal of the prosecution though may be at the instance of the State, it is expected to be thoroughly looked into by the Public Prosecutor, who is acting as the Minister of Justice to justify for such withdrawal before he acted on behalf of the State. When he had exercised that move to withdraw the case, then the burden is upon the Court, to appraise itself of the reasons which prompted the public prosecutor to withdraw from the prosecution. Both of them have the heavy responsibility to protect the administration of justice, against the possible abuse of the power by the executive. In this case, both the public prosecutor and Courts were satisfied that the withdrawal would promote the ends of justice. But, however, now the very same office of the public prosecutor would allege *mala fide* in their moves for withdrawal. I feel that the same office, of the public prosecutor, which acted for the State to withdraw the cases, cannot come forward to set aside the order permitting to withdraw the cases, irrespective of the change in the ruling party, as it will lead to uncertainty as to the finality of the proceedings. When the Government ruled by a particular party withdraw the prosecution and the successive Government, ruled by another party, wanted to set aside that order, what will be the situation, if there were successive changes in the ruling parties and if this request is allowed, certainly it will be a havoc and prejudice to the accused persons, without knowing the destination of the prosecution, apart from the embarrassment to the public prosecutors."

Thus, it is evident from the above comment of the Madras High Court that once withdrawn criminal prosecution cannot be restarted to serve political interests.

Role of Court in Withdrawing Criminal Charges-The respective court consenting to withdraw the prosecution is under legal obligation to be very cautious and vigilant that the permission to withdraw prosecution should not be an effective tool to misuse the law and legal system. Supreme Court in *M.N.S Nair v. P.V Balakrishnan*[19], held that "a duty is cast upon the Court to give permission to withdraw, not as a mere formality simply for the asking of it, but only if it is satisfied on the material placed before it that giving of permission for withdrawal would sub-serve administration of justice, and that permission is not sought for with ulterior motive."

In *State of Bihar v. Ram Naresh Pandey*[20], the Supreme Court observed that "the judicial function, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been

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[18]1995 CriLJ 3849.
[19]AIR 1972 SC 496.
[20] [1957] S.C.R. 279.

improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In this context it is right to remember that the Public Prosecutor is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly-considered view and the Court is entitled to have the benefit of the fair exercise of his function."

Mentioning the role of the court in respect of withdrawal from prosecution, Calcutta High Court in *G.V. Raman v. Emperor*[21], laid down a test mentioning that "one test and a very important test is whether in coming to a decision it has taken into consideration extraneous circumstances which ought not properly to have been taken into account."

Supreme Court of India in *Sheonandan Paswan v. State of Bihar & others*[22], held that "all that is necessary for the Court to see is to ensure that the application for withdrawal has been properly made, after independent consideration, by the public prosecutor and in furtherance of public interest." Further, the Court ruled that "if the case has been withdrawn by the Public Prosecutor for good reason with the consent of the Court, Supreme Court should be slow to interfere with the order of withdrawal."

In *Rajendra Kumar Jain v. State*[23], famously known as 'George Fernandes' Case', the Supreme Court said that "the Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of section 321 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case… The Court performs a supervisory function in granting its consent to the withdrawal. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

Hon'ble Dr. Dhananjaya Y. Chandrachud and M R Shah, JJ. speaking for the Supreme Court in *State of Kerala v. K. Ajith & others*[24], formulated the following principles on the withdrawal of a prosecution under Section 321 of the CrPC-

> (i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;
> (ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

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[21]AIR 1929 Cal 319.
[22]Supra note 6.
[23]1980 SCR (3) 982.
[24] Criminal Appeal No 697 of 2021 on July 28, 2021 (SC).

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;
(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;
(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:
(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;
(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;
(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;
(d) The grant of consent sub-serves the administration of justice; and
(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;
(vi) While determining whether the withdrawal of the prosecution sub-serves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and
(vii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent.

Competency to Consent: Committal Court or Trial Court

Earlier there was confusion regarding the competency of court to give consent to withdraw from prosecution. In other words, the Public Prosecutor has to obtain consent from which court-Committal Court or Trial Court? This question has been raised before courts at many times. On this particular issue Andhra Pradesh High Court in *A. Venkataramana v. Mudem Sanjeeva Ragudu*[25], held that a Committing Magistrate is not authorised to give consent to withdraw from the prosecution.

Overruling the above decision of the Andhra Pradesh High Court[26], Hon'ble Supreme Court in *Rajendra Kumar Jain v. State*[27], ruled that the committal court is enough competent to grant permission to withdraw from

[25] (1976) *Andhra Law Times Reports* 317.
[26]*A. Venkataramana v. Mudem Sanjeeva Ragudu*, (1976) *Andhra Law Times Reports* 317.
[27]Supra note 23.

prosecution. In this case, the plea was taken that as the case was triable by the Sessions Court, the Committing Magistrate cannot grant its consent to withdraw from the prosecution as it was not invested with the power of acquitting or discharging the accused. The Court held that "there is no warrant for thinking that only the Court competent to discharge or acquit the accused under some other provision of the Code can exercise the power under section 321 Criminal Procedure Code. The power conferred by section 321 is itself a special power conferred on the Court before whom a prosecution is pending and the exercise of the power is not made dependent upon the power of the Court to acquit or discharge the accused under some other provision of the Code."

Mentioning Reasons of Withdrawal by Public Prosecutor/ Consenting Judge:

A general question has been raised before the courts whether the Public Prosecutor and the Judge is bound to give reasons in application of withdrawing the prosecution or consenting to the withdrawal from criminal charges respectively? Actually, mentioning the reasons of any action has become necessity of modern jurisprudence and it is being accepted as the part of principle of natural justice, known as 'speaking order'.[28] It has various advantages like under-

(a) It provides everyone to know the basis of such action/order.
(b) It prohibits issuing orders mechanically.
(c) Authorities are prohibited acting arbitrarily and whimsically.
(d) It links relation between order issued and available materials on records.

Giving reasons must be equally applicable for the Public Prosecutor while applying before the court as well as for the court also while consenting the withdrawal. But, sections 321 CrPC is silent on this particular issue. *In re Sadayan*[29], Madras High Court held that "neither the Public Prosecutor nor the Judge is called on to give any reasons for his action, that is, either in the application to withdraw or in granting permission to withdraw." This case has been followed in *Kapa Kasi Viswanadham v. Bondili Madan Singh*[30] also.

The Calcutta High Court in *Umesh Chandra Roy v. Satis Chandra Roy*[31], held that the court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised.[32]

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[28]Supreme Court in *Kranti Associates Private Limited v. Masood Ahamed Khan*, (2010) 9 SCC 496 also favoured to mention the reasons which may affect the rights of parties. It must not be like the "inscrutable face of a sphinx".

[29](1908) 5 MLT 216.

[30]AIR 1948 Mad 422. In this case, the Court said that it was not obligatory upon the Magistrate to record any reasons for the withdrawal and since it is not shown that he has acted arbitrarily or in any unjudicial manner, the order of discharge cannot be interfered with.

[31]41 Ind. Cas. 998.

[32]This view has been followed by Calcutta High Court in *Rajani Kanta Shaha v. Idris Thakur*, 64 Ind. Cas. 280; *Jagat Chandra Roy v. Kalimuddi Sardar*, 71 Ind. Cas. 693 and Rangoon High Court in *Abdul Gani v. Abdul Kader*, (1923) I.L.R. 1 Rang. 756.

But, Patna High Court in *Gulli Bhagat v. Narain Singh*[33], after discussing the question at some length, dissented from the above view of the Calcutta High Court and noted that "these cases overstate the law. Section 494 does not expressly require the Court to give any reasons for consenting to the withdrawal nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. There are many final orders known to the Code for which no reasoned judgment is required." In *Lakshminarain Varma v. Mohamed Hanif*[34], Harrison, J., agreeing with the opinion of the Patna High Court[35] and disagreeing with the view taken by a single Judge of the Rangoon High Court[36] refused to accept that court has to mention its reasons. Hon'ble Bombay High Court in *Ratanshah Kavasji v. Keki Behramsha*[37] and Nagpur High Court in *Dattatraya Govindrao v. Emperor*[38], are in favour of views expressed by the Patna High Court which held that in permitting the Public Prosecutor to withdraw from the prosecution, the Court is not bound to record its reasons for giving consent.

Rajasthan High Court in *Amar Narain Mathur v. State of Rajasthan*[39], opined that "... even where the Public Prosecutor intimates to the Court that he wants to withdraw from the prosecution for reasons of State, it is the duty of the Court to enquire what those reasons are before it gives consent... Where, however, the reasons are of a confidential nature, it is the duty of the Public Prosecutor to give an affidavit of some responsible officer of the State to the effect that the reasons are of a confidential nature, and it would not be in the public interest to disclose them. Where such an affidavit is given, it will be for the Court to decide whether, considering the nature of the case, it should give its consent without further disclosure of reasons."

In *Ranjana Agnihotri and others v. Union of India*[40], the Supreme Court held that "the Court has to record a finding that the application moved by Public Prosecutor is in the interest of administration of justice and there is no abuse or misuse of power by the Public Prosecutor or the Government. In case an application is allowed, it must be recorded by the Court that the application has been moved in good faith to secure the ends of justice and not in political or vested interest. The court has final say in the matter and the decision should be free and fair with independent exercise of mind in the interest of public policy and justice."

Concluding Observations:

The power to withdraw criminal charges, being the prerogative of the State, must be exercised in the interest of administration of criminal justice and it should not be an instrument of serving the political agenda and personal interests. It is reality of the Indian criminal justice system that this power has been abused or misused in many cases to serve only political interests which directly affects the credibility and efficacy of the legal system in addition to

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[33](1923) I.L.R. 2 Pat.708.
[34]AIR 1932 Lah 368.
[35]*Gulli Bhagat v. Narain Singh*, (1923) I.L.R. 2 Pat.708.
[36]*Abdul Gani v. Abdul Kader*, (1923) I.L.R. 1 Rang. 756.
[37]I.L.R. (1945) Bom. 141 N.J.
[38]AIR 1938 Nag 76.
[39]AIR 1952 Raj 42.
[40]Writ Petition No. 4683 (M/B) of 2013 on 12th December, 2013 (SC).

disregard to victim's rights. Hon'ble Supreme Court in *Rajendra Kumar Jain v. State*[41], has very rightly mentioned the misuse of this power as under-

> "Criminal justice is not a plaything and a Criminal Court is not a play-ground for politicking. Political fervour should not convert prosecution into persecution, nor political favour reward wrongdoer by withdrawal from prosecution. If political fortunes are allowed to be reflected in the processes of the Court very soon the credibility of the rule of law will be lost. So we insist that Courts when moved for permission for withdrawal from prosecution must be vigilant and inform themselves fully before granting consent. While it would be obnoxious and objectionable for a Public Prosecutor to allow himself to be ordered about, he should appraise himself from the Government and thereafter appraise the Court the host of factors relevant to the question of withdrawal from the cases. But under no circumstances should allow himself to become anyone's stooge."

The concept of withdrawal from prosecution sends a wrong and negative message to the society creating the atmosphere of havoc and terror in law abiding persons and it encourages the law-violators. Further, this power should be exercised to strengthen the criminal justice system and not to weaken the rule of law. Ensuring justice, peace and establishment of rights based society is prime concern of the State which can be only guaranteed by punishing the law-violators and rewarding the law-abiders. Furthermore, the Public Prosecutor in-charge of the case, though he is under complete control of the State, must exercise his discretion independently free from any influence of the government and must avoid the arbitrary dictation of the State. Being officer of the court, he must function to ensure that any guilty person should not be escaped from the criminal accountability.

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[41]Supra note 23.

AN ANALYSIS OF THE ROLE OF STAKEHOLDERS UNDER THE RIGHT TO INFORMATION ACT

Mompi Dey*

Abstract: The Official Secrets Act, 1923 was created to keep government information from being shared with the public, while the RTI Act 2005 aimed to promote transparency and reduce corruption.[1] This paper examines how the appellant and the public authority can better use their rights to prevent corruption and increase transparency as well as balance disclosure and non-disclosure. It also looks at the importance of sensitizing people about the kind of information that can be requested and the limitations of the RTI Act. Both citizens and public authorities have a role to play in ensuring good governance, and this paper offers suggestions on how they can fulfil their respective duties. This paper aims to investigate whether the RTI Act is an effective tool for citizens in their pursuit of a transparent and responsive government. However, there is a need for awareness among the public regarding the types of information that can be requested and that the RTI Act cannot resolve grievances against the government. The sanctity of the Act should be maintained by public authorities by adhering to the spirit in which it was enacted. Both the rights and duties of applicants and public authorities must be considered to ensure good governance, and this paper offers suggestions for the way forward.
Keywords: Right to Information, Privacy, Implementation.

Introduction:

The Right to Information Act was enacted in 2005 with the objective to prevent corruption and ensure transparency in the functioning of the Government. It received widespread coverage through media, including radio and other platforms, to spread awareness about its provisions. Civil society movements played a significant role in promoting the practical use of the Act across the country. Public authorities were given time to become RTI compliant, resulting in the publication of a lot of information on web portals and websites. However, since its enactment, there has been a shift in the perception of the Right to Information from the perspective of RTI applicants. Nevertheless, success stories also demonstrate that citizens are actively using the right to information.[2] Prior to this Act, there was no independent authority like the Central Information Commission or State Information Commission to ensure the implementation of the right to information. It is equally important to acknowledge all three pillars of the RTI Act that have statutory responsibility for ensuring its implementation.

Role and Responsibilities of the CPIO, Appellant and Third parties:

The following hierarchical structure illustrates the implementation scheme of the Act-

1. **Central Public Information Officer (CPIO) -** As per Sec 2(c) of the RTI Act, the Central Public Information Officer is the officer designated under sub-section 5(1) of the Act.[3]

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[1] https://blog.ipleaders.in/conflict-between-right-to-information-and-official-secrets-act-1923/
[2]https://www.researchgate.net/publication/356035906_IMPACT_AND_SUCCESS_STORIES_OF_RIGHT_TO_INFORMATION_ON_DEVELOPMENT_AN_OVERVIEW
[3] https://rti.gov.in

2. **First Appellate Authority (FAA) -** The First Appellate Authority is not defined under the Act, but usually, the individual is an officer who is senior in rank to the CPIO.
3. **Central Information Commission/State Information Commission -** As per Sec 2(b) of the RTI Act, the Central Information Commission is constituted under sub-section 12(1) of the Act. Similarly, as per Sec 2(k) of the RTI Act, the State Information Commission is constituted under sub-section 15(1) of the Act.[4]

Both the applicants and the CPIOs are provided with certain rights and duties for the smooth functioning of the RTI Act. Additionally, the Act recognizes the rights of third parties and the importance of their right to privacy. Understanding these rights and duties is essential for a detailed analysis of the legislative scheme in the enactment of the RTI Act.

Rights of the CPIOs as per the RTI Act are as follows:

(a) **Assistance from other officers** - As per Sec 5(4) of the RTI Act, the CPIO may seek assistance from any officer whom he or she considers necessary for the discharge of their duties.[5]
(b) **Transfer of RTI application** - As per Sec 6(3) of the RTI Act, the CPIO can transfer the RTI application, either in whole or in part, to another public authority if the application pertains to the latter. The CPIO must inform the applicant of such transfer within 5 days from the date of receipt of the RTI application.[6]
(c) **Right to refuse information** - As per Sec 7(9) of the RTI Act, the CPIO has the right to refuse information if providing the same would disproportionately divert the resources of the public authority or be detrimental to the safety or preservation of the record in question.[7]
(d) **Right to deny information exempted under Sec 8 and 9 -** The CPIO has the right to deny information if it is exempted under Sec 8 and 9 of the RTI Act.[8]
(e) **Right to be heard before penalty is imposed** - The CPIO has the right to be heard before a penalty is imposed, as prescribed under the proviso to Sec 20 of the RTI Act.[9]

Rights of the Applicants as per the RTI Act are as follows:

1. **No requirement to provide reasons for seeking information -** The most important right provided to the applicants under the RTI Act is that they are not bound to provide any reason for seeking information, as per Sec 6 of the RTI Act.
2. **Right to access information-** RTI applicants have the right to access information held by public authorities, subject to certain exemptions and conditions specified in the RTI Act.

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[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid
[8] Ibid
[9] https://rti.gov.in

3. **Right to privacy-** RTI applicants' personal details, except for the communication address, are not required to be provided as per Section 6(2) of the RTI Act.
4. **Special rights for disabled applicants-** Applicants with sensory disabilities have the right to get assistance for inspection, as appropriate, as per Section 7(4) of the RTI Act.
5. **Right to fee waiver for BPL applicants-**Persons belonging to the Below Poverty Line (BPL) category are not charged any fee for accessing information as per Section 7(5) of the RTI Act.
6. **Right to free information when the timeline is not followed-** If the Central Public Information Officer (CPIO) does not provide a response within the timeline, the applicant has the right to get the information free of cost as per Section 7(6) of the RTI Act.
7. **Right to complaint-** Applicants have the right to file a complaint under Section 18 of the RTI Act in case of various scenarios such as the CPIO refusing to accept the application, not providing a reply within the timeline, asking for unreasonable fee, providing incomplete or false information, or obstructing access to information.
8. **Right to appeal**-Applicants have the right to appeal under Section 19 of the RTI Act to a higher-ranked officer than the CPIO in case of no reply or improper reply.
9. **Right to get FAA's order within 30 to 45 days**-The First Appellate Authority's (FAA) order should be received within 30 to 45 days as per Section 19(6) of the RTI Act.
10. **Right to compensation**- Applicants have the right to get compensation for any loss or detriment suffered as per Section 19(8)(b) of the RTI Act.
11. **Right to penalize the CPIO-** Applicants have the right to get the CPIO penalized as per Section 19(8)(c) of the RTI Act.

Rights of Third Parties:

1. **Right to notice-** Third parties have the right to notice in case any information related to them or supplied by them is intended to be disclosed by the CPIO as per Section 11 of the RTI Act.
2. **Right to be heard**- Third parties have the right to have their views considered by the CPIO while making a decision on disclosure.
3. **Right to appeal**-Third parties have the right to appeal against the decision of the CPIO as per Section 11(4) of the RTI Act.
4. **Right to be heard by CIC**- Third parties have the right to have a reasonable opportunity for being heard by the Central Information Commission (CIC) as per Section 19(4) of the RTI Act.

Duties of RTI Applicants:

1. **Duty not to misuse**- Applicants have the duty not to misuse the RTI Act and avoid filing frivolous second appeals involving frivolous issues.[10]
2. **Duty not to seek own documents**- Applicants do not have the right to seek copies of their own documents under the RTI Act.[11]

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[10] https://legalserviceindia.com/legal/article-8072-misuse-and-loopholes-of-the-rti-act.html

[11] *Public Information Officer v. Central Information Commission*, W.P.No.26781 of 2013 decided on 17 September, 2014 (Madras).

3. **Duty not to file repeated RTI applications on the same subject matter**- Applicants should avoid seeking out favorable jurisdictions or venues to gain an unfair advantage.

Duties of CPIO (Central Public Information Officer):

1. **Provide timely reply-** The most important duty of a CPIO is to provide a timely reply to the RTI applicant. As per Section 7(2) of the RTI Act, it is a statutory duty of the CPIO to provide a reply to the RTI application as expeditiously as possible and in any case within 30 days from the date of receipt of the RTI application.
2. **Exercise due care in disclosing information-** The CPIO has an implied duty to exercise due care while replying to RTI applications, and in any case, not to disclose any information which is otherwise exempted under Sections 8 and 9 of the RTI Act. The CPIO has the sole authority to deal with RTI applications and should execute this duty to the best of their understanding and capacity.
3. **Protect life and liberty of citizens-** The CPIO has a duty to protect the life and liberty of citizens. As per Section 7 proviso of the RTI Act, if the information sought concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the RTI application.
4. **Consider representation of third parties-** The CPIO's duty is to take into consideration the representation of third parties under Section 11 of the RTI Act before taking any decision.
5. **Provide reasons for rejection-** As per Section 7(8) of the RTI Act, the CPIO should provide the reasons for rejection if information is denied, and mention the time period within which the appellant has to file an appeal, along with the particulars of the Appellate Authority.
6. **Deal with requests and provide reasonable assistance**-The CPIO shall deal with requests regarding information sought by the applicant or shall render reasonable assistance to persons seeking such information as per Section 5(3) of the RTI Act.
7. **Treat failure to provide assistance as deemed PIO-** As per Section 5(5) of the RTI Act, any officer shall be treated as CPIO if he fails to provide assistance to the CPIO as mandated under Section 5(4) of the RTI Act. The concept of deemed PIO is also mentioned in the Act.
8. **Provide assistance to applicants unable to file in writing-** As per Section 6 proviso of the RTI Act, in case any applicant is unable to file the RTI application in writing, the CPIO shall provide all reasonable assistance to the applicant to file the RTI application in writing.
9. **Onus to prove denial of request was justified-** As per Section 19(5) of the RTI Act, in the first appeal or second appeal proceeding, the onus is on the CPIO to prove that the denial of a request was justified.

Analysis of the efficacy of the RTI Act:

It is important for CPIOs to perform their duties diligently to ensure that the right to information is upheld and that transparency in government is maintained. Similarly, RTI applicants should seek information that falls within the ambit of the RTI Act and is related to transparency, not grievances. By adhering to the principles of the RTI Act, it can be a constructive tool for good governance. It is also important to safeguard the freedom of information and prevent any dilution of the efficacy of the Act.

After discussing the rights and duties of the applicant, CPIOs, and third parties in relation to the Right to Information (RTI) Act, it is important to evaluate whether the right to information is able to meet the expectations of the citizens. While the RTI Act serves as a tool for ensuring transparency in government, there are certain conditions that need to be met. One of the primary conditions is that the information sought must fall within the ambit of Section 2(f) of the RTI Act, which defines the category of materials considered as information. Often, information cannot be disclosed not because it is exempted under the RTI Act, but because it does not fall within the scope of Section 2(f) of the RTI Act.

Once the test of Section 2(f) is met, the next step is to examine whether the information sought is exempted under Sections 8 and 9 of the RTI Act. If the information is not exempted and its disclosure does not disproportionately divert the resources of the public authority, then it should be provided to the applicant. Even if the information sought is related to private interest and not public interest, it must be disclosed if it is not exempted under Sections 8 and 9 of the RTI Act. The exemptions under Sections 8(1)(a) to (j) of the RTI Act have been well elucidated in various decisions of the Central Information Commission, High Courts, and the Supreme Court, and therefore, are no longer *res integra*. However, information cannot be considered exempted in a blanket manner unless identical information has already been treated as exempted by the CIC or the Courts.

If the duties of the CPIOs are performed diligently, there will be fewer routine appeals and only questions pertaining to the applicability of exemptions or public interest will be the subject of second appeals. This can be achieved through vigilant CPIOs and Deemed PIOs. Similarly, if applicants understand and cherish the Act, and seek information that falls within the ambit of Section 2(f) and is related to transparency rather than grievances, the RTI Act can be a constructive tool for good governance.

Concluding Observations:

In conclusion, the preservation of the hard-earned right to freedom of information is essential and should not be weakened. Dilution attempts on the effectiveness of the Act are common, making it crucial for informed and responsible citizens to exercise their right to information responsibly. Public information officers (PIOs) and appellate authorities (AA) should view their roles as facilitators rather than mere implementers of the Act. While the Central Information Commission (CIC) is not obligated to resolve appeals and complaints within a specific timeframe, taking effective measures to filter out frivolous and repetitive appeals can ensure timely resolution of genuine issues faced by the CIC.

The website pgportal.gov.in outlines certain issues that are not considered for redressal, such as cases under judicial consideration, matters related to court judgments, personal and family disputes, RTI matters, anything impacting the country's territorial integrity or international relations, and suggestions. Similar exclusions, including clarifications, opinions, and grievances, can be specified on the websites of the CIC, Department of Personnel and Training (DoPT), and RTI portals. Establishing an online mechanism for RTI applications is vital to achieve real-time information access for all applicants.

While the RTI portal at rtionline.gov.in provides access to Central Public Authorities and facilitates online payment of RTI fees, several states still lack this facility even after 17 years since the Act was enacted. Online connectivity is a significant milestone in enhancing the effectiveness of the Act, and therefore, establishing an online RTI portal for every state can be a stepping stone towards fulfilling the Act's objectives.[12]

Public authorities can adopt best practices from other agencies for the effective implementation of the RTI Act. To promote this, platforms should be created to periodically showcase these best practices, and recognizing the efforts of PIOs and AAs can serve as an incentive for them to ensure prompt and efficient handling of applications.

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[12] https://pgportal.gov.in/

ADOPTION RULES IN INDIA WITH SPECIAL REFERENCE TO JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2021

Dr. Baleshwar Prasad*

Abstract: The Parliament enacted the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 with a view to strengthen and provide efficient provisions related to the protection and adoption of children. The Juvenile Justice (Care and Protection of Children) Amendment Act, 2021, was passed to amend various provisions of the Juvenile Justice Act, 2015 in accountability of concerned authorities. By this Act, from September 1, 2022 District Magistrates have been empowered to give adoption orders instead of courts. It has been compiled in accordance with the constitution and with the objective of fulfilling India's commitment as a signatory to the United Nations Conventions on the Children's Rights.
Keywords: Juvenile Justice, Protection, Adoption, District Magistrate, Accountability.

Introduction:

The Indian Parliament enacted the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 in July 2021 in order to amend the various provisions of Juvenile Justice Act (JJ Act), 2015. The notification of the 'Model Amendment Rules 2022' to implement the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 that came into force on September 01, 2022 marks the beginning of a significant shift with district magistrates (DMs) getting the power to issue adoption orders that was so for the domain of the district courts. It is stated in the gazette notification that "all the cases pertaining to adoption matters pending before the court shall stand transferred to the district magistrates from the date of commencement of these rules."

The Act enabled smooth functioning of adoption procedure, for orphans, surrendered and abandoned children while making the Central Adoption Resource Authority (CARA), the statutory body for adoption-related matters. All cases pending before courts have to be now transferred to district magistrates. Hundreds of adoptive parents in the country are now concerned that the transfer process will further delay what is already a long and monotonous process. There are questions whether an order passed by the executive authority will stand when an adopted child's entitlements on succession and inheritance are contested before a court.

Salient Features of Amended Rules related to Adoption:

The key changes include authorizing District Magistrates to issue adoption orders under section 61 of the Juvenile Justice Act, 2015 by striking out the word "Court". Now, after the amendment section 61 of the JJ Act, is as following:

> **61. Procedure for disposal of adoption proceedings**[1].- (1) Before issuing an adoption order, the District Magistrate[2] shall satisfy itself that-

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(a) The adoption is for the welfare of the child;
(b) Due consideration is given to the wishes of the child having regard to the age and understanding of the child,
(c) That neither the prospective adoptive parents has given or agreed to give nor the specialized adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus.

(2) The adoption proceedings shall be held in camera and the case shall be disposed of by the District Magistrate[3] within a period of two months from the date of filing.

Section 63: Effect of adoption.-A child in respect of whom an adoption order is issued by the District Magistrate, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family:

Provided that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child subject to the obligations, if any, attached to the ownership of such property including the obligations, it any, to maintain the relatives in the biological family.

Section 16:

In section 16 of the principal Act i.e. the JJ Act, 2015; after the sub-section (3) the following sub-section shall be inserted, namely-

"(4) The District Magistrate may, as and when required, in the best interest of a child, call for any information from all the stakeholders including the Board and the Committee."

The District Magistrate have also been empowered under the Act to inspect child care institutions as well as evaluate the functioning of district child protection units, child welfare committees, juvenile justice boards, specialized juvenile police units and child care institutions etc[4].

In section 27 of the principal Act-

I. for the sub-section(8), the following sub-section shall be substituted, namely-

"(8) The committee shall submit a report to the District Magistrate in such form as may be prescribed and the District Magistrate shall conduct a quarterly review of the functioning of the committee."

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[1] Substituted by sec. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2021, for the marginal heading (w.e.f. 01-09-2022)
[2] Subs. By sec. 21 ibid, for court (w.e.f. 01-09-2022)
[3] Subs. By sec. 21 ibid, for court (w.e.f. 01-09-2022)
[4] Subs. By sec. 22 ibid, for court (w.e.f. 01-09-2022)

II. for the sub-section(10), the following sub-section shall be submitted, namely-

"(10) The District Magistrate shall be the grievance redressal authority to entertain any grievance arising out of the functioning of the committee and the affected child or anyone connected with the child, as the case may be, may file a complaint before the District Magistrate who shall take cognizance of the action of the committee and, giving the parties an opportunity of being heard, pass appropriate order."

Adoption Procedure in India and Challenges

Adoption in India are governed by two laws – the Hindu Adoption and Maintenance Act, 1956 (HAMA) and the Juvenile Justice Act, 2015. Both laws have their separate eligibility criteria for adoptive parents.

Those applying Juvenile Justice Act, 2015 have to register Central Adoption Resource Authority (CARA)'s portal after which a specialized adoption agency carries out a home study report. After it the agency finds the candidate eligible for adoption, achieved declared legally free for adoption is referred to the applicant.

Under the Hindu Adoptions and Maintenance Act, 1956, a "dattak hom" ceremony or an adoption deed or a court order is sufficient to obtain irrevocable adoption rights Section 6 to 11 of this Act describes about some requisites and restrictions for a valid adoption such as: capacity of a male Hindu to take in adoption, capacity of a female Hindu to take in adoption, persons capable of a giving in adoption, persons who may be adopted and other conditions for a valid adoption under section 11 of this Act. But there are no rules for monitoring adoptions and verifying sourcing of children and determining whether parents are fit to adopt.

There are many problems with the adoption system under CARA but this is the fact that there are very few children in its registry. According to the portal of Central Adoption Resource Authority, there were 2991 in-country adoptions and 414 inter-country adoptions in 2021-22. Similarly, according to the 118th report on Review of Guardianship and Adoption Laws, Presented to the Rajya Sabha on 8th August 2022 as on December 16, 2021, there were 2430 children declared legally free for adoption for 26734 adoptive parents in waiting[5]. This allows traffickers to take advantage of loopholes in Hindu Adoptions and Maintenance Act. These concerns were also highlighted by a Parliamentary panel in its report on the "Review of Guardianship and Adoption Law", which recommended a district-level survey of orphaned and abandoned children.

In this condition what is needed is a "Child-centric, optional, enabling and gender-just" special adoption law like in other countries. HAMA is a parent-centric law that provides son to the son-less for reasons of succession, inheritance, continuance of family name and for funeral rights and later adoption of daughters was incorporated because 'kanyadan' is considered an important part of dharma in Hindu tradition. As for as the Juvenile Justice act, 2015 is concerned, the law handles issues of children in conflict with law as well

[5] *The Hindu*, Lucknow edition, 03-Oct-2022, p. 6

as those who are in need of care and protection and only has a small chapter on adoptions[6].

Adoption of a child is a legal process which creates a permanent legal relationship between the child and adoptive parent. Therefore, it may be questioned whether it is appropriate to vest the power to issue adoption orders with the District Magistrate instead of civil court.

The Ministry of Women and Child Development has all along defended the move to enable the DMs to issue adoption orders as the need of the hour, claiming that it will enable speedy disposal of adoption cases, curtail long delays and enhance accountability. However, in a report presented in the mansoon session 2022 of Parliament on reviews of the adoption and guardianship laws, the parliamentary department related standing committee on personnel, public grievances and law and Justice observed that it feels that it is not appropriate for an administrative authority to issue adoption orders instead of a Judicial body. However, nothing that since the Act has been amended and the new system is yet to be tried and tested, the committee recommended that the WCD Ministry must review the functioning of the new system, after a year and present an assessment report to it[7].

Concern over the revised Rules:

The revised rules have worried the parents, activists, lawyers and adoption agencies as cases already before courts for the past several months will have to be transferred and the process will have to start a fresh. A petition for adoption orders is filed after a parent registers for adoption, which is then assessed through a home study report, referred a child and subsequently allowed to take a child in pre-adoption faster care pending an adoption order. A delay in such an order can often mean that a child cannot get admission into a school because parent do not yet have a birth certificate, or like in one case, parents unable to claim health insurance if a child is admitted to a hospital.

The Central Adoption Resource Authority (CARA) reported that there are nearly 1000 adoption cases pending before various courts in the country. Parents and lawyers also state that neither judges, nor DMs are aware about the change in the JJ Act leading to confusion in the system and delays. According to CARA, the Ministry of Women and Child Development is drafting a letter to be sent to state government clarifying that where adoption orders have already been given, or will be given shortly, the DMs should consider them valid. But there are also large concerns. District Magistrates don't handle civil matters that bestow inheritance and succession rights on a child. If these rights are contested when a child turns 18, a judicial order is far more tenable to ensure the child is not deprived of his or her entitlements[8].

Merits of the amended Rules, 2021:

Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 seeks to increase the role of District Magistrates and Additional District

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[6] *The Hindu*, Lucknow edition, 12-Sep-2022, p. 8
[7] *Times of India*, Lucnow edition, 03-Sep-2022
[8] *The Hindu*, Lucknow edition, 12-Sep-2022, p. 8

Magistrates in matters concerning child care and adoption. The amendment provides strength to the provision of protection and adoption of children. There are many adoption cases pending before the courts and to make proceedings of the court faster, now the power is transferred to the district magistrates. The amendment empowers the district magistrates, enhance child welfare committee and enhance accountability by empowering district magistrates to deal with child protection and adoption process. It aims to facilitate a coordinated and effective response of the administration to various issues pertaining to children, including adoption. The new law seeks to make District Magistrates as synergizing officers.

The amendment makes the district magistrates the grievance redressal authority for the child welfare committee and anyone connected with child may file a petition before the official, who shall consider and pass appropriate orders.

With the new Act, the government has implicated some changes which put more responsibility on bureaucrats. The long going failure in the implementation of juvenile laws resulting in the increase of minor crimes, failure of minor agencies, lengthy procedures of adoption etc. The Model Rules, as part of the roadmap to curtail delays state that the DM or the authority authorized by the DM will dispose of an application for making an adoption order within a period of two months from the date of filing of the application. This Act will be responsible for ensuring that minor agencies falling in the districts follow all norms and procedures.

The rules also provide the way forward on “foster care” and “Group foster care”. Every child who does not get a family either in inter-country adoption and is placed under the “hard to place category”, will be eligible to be placed in foster care, by the child welfare committee on the recommendation of the district child protection unit or the specialized adoption agency.

The Central government will be issuing model guidelines for nor-institutional care based on which the process for selection of the foster care and group foster care setting shall be notified by the state government. All foster families willing to take child under “group foster care” will made an application to the state government. After considering the recommendations of the DM and due verification, the state government will issue a registration certificate.

To step-up monitoring of child care institutions, the central government will facilitate developing a model online system for receipt and processing of applications and grant or cancellation of registration. The DM will conduct a detailed annual inspection of all the registered institutions in the district.

Demerits/Problems of Amended Rules, 2021:

There are so many problems and demerits in the Amended rules 2021. Empowering of district magistrates to issue adoption orders may lead to delays as they are already over-burdened with several responsibilities such as maintenance of law and order, land and revenue administration, disaster management, general administration, implementing government schemes and programmes in their district and all other functions.

Lack of Judicial Scrutiny in adoption orders is another issue. The Act provides that any person aggrieved by any adoption, may file on appeal before the divisional commissioner. Thus, it does not provide for judicial oversight at the appeal stage as well. Vesting of such core judicial functions with these authorities may also raise concern of separation of powers between the executive and the judiciary.

Lack of availability and limited capacity of institutions set-up under the Act is another issue to be resolved. Juvenile Justice Board and Child Welfare Committee are not present in many states. Several bodies existed only on paper and are not functioning. Further, populous districts which are likely to produce larger caseloads had inadequate child welfare committees. These bodies lack authority to manage their financial and human resources and are depended on the state or district administration. Due to lack of infrastructure or specific funds, action taken by them is limited and delayed. It requires greater financial allocation, training and cadre-building for various bodies[9].

Concluding Observations:

There was a need to check malpractices and improve monitoring in Juvenile Justice Act, 2015. But in the amended rules the soul of adoption is gone. The human contact bonding and psychological preparedness has been taken away. Though this amendment Act seems to be revolutionary but its implementation in the practical world will decide its impacts. The amendment seeks to strengthen the protection of children and also efficient the adoption process which indicates a good future of the juvenile justice system. It seems like an encouraging Act bringing in transparency and accountability for the best interest of the children. This recent amendment is one of the much-needed steps and has been welcomed by most, but for better result, there is a need to proper training and monitoring of officials, as district magistrate usually are not trained or equipped to deal with these specific laws. To ensure safety of the children's district administration should work in close coordination with all five arms-child welfare committees, Juvenile Justice Boards, Child Care Institutions, district child protection units and special Juvenile police units.

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[9] http://www.prsindia.org accessed on 20-Sep-2022

THE NEW LABOUR CODE AND ITS FUTURE IMPLICATIONS ON CONTRACT LABOURS: A LEGAL ANALYSIS

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Abstract: It is evident from the history of mankind that for any country to prosper and develop economically needs large scale Industrialization and to establish a good, industrialised economy one of the most required constituents is Labour. The Industrialists to survive the competitions have found contract labours as the alternative of payroll workers. Contract labours are beneficial for the investors because they can be engaged in very less cost, and they are hardly unionised. These labours have long history of being subjected to exploitation by, the industrialists and the contractors. Thus, to regulate and prohibit the practice of contract labours, in 1970s the CLRA Act was enacted. However, the Act has failed to solve the issues emerging out of the contract labour system. It was even felt by the planning commission in the second five-year plan that the law relating to contract labours needed to be changed. As a result of which a new law has been drafted and incorporated into the Occupational Safety and Health and Working Condition Code, 2020, which will govern the contract labour system once it is enforced. This paper deliberates and discusses the changes brought in the Code and its future implications.

Keywords: Contract Labour, Principal Employer, Contractors, CLRA Act 1970, OSH & WC Code 2020.

Introduction:

It can be traced from the history of mankind that for any country to prosper and develop economically needs large scale Industrialization. It involves a process wherein; the economy of a nation shifts from primary agriculture-based production to mass production of technologically advance goods and services. In this phase the productivity takes an exponential leap and leads to an increased, standard of living and per capita income. The productivity and living standard of the human race remained constant from the inception of the agricultural age around 8000 to 5000 B.C. until the period of first industrialisation in Britain commenced in 1760. Thus, it would not be wrong to say that industrialisation is the most valued economic development in history of mankind. It has paved the way for more goods produced in lesser time and an overall growth of the economy[1]. The advantages of having an industrialised economy are many, such as, a well-maintained import and export market, availability & affordability of goods, increase in employment, technological

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[1] Michael J Boyle, "Is Industrialization Good for the Economy?", 2021 *Investopedia* available at https://www.investopedia.com/ask/answers/033115/industrialization-good-economy.asp#:~:text=Industrialization%20has%20been%20instrumental%20in,has%20increased%20standards%20of%20living.

advancement, developed medical facilities, increase in earning capacity, high educational awareness, etc[2].

To establish a good, industrialised economy one of the most required constituents is Labour. Thus, it will not be an exaggeration to state that 'labour' represents the bedrock of economic development[3]. Without labour the imagination of industry is impossible. Work force of any company can be considered as its greatest strength. The companies recruit people in their pay roll and pay them for their work. However, the competition in the market is so high that everyone wants to produce the goods in less cost. At the same time engagement of permanent labour is very expensive for the company as it comes with wages and other compliances.

However, the companies have found alternative of the permanent workmen, and which is the contract labours. Even in the competitive nature of business performances in the market the use of Contract Labour system has got gear up in various industries. The labour costs often become a significant reason which directly influences the financial survival in the trade market. Therefore, keeping in view of many economic sectors and to some extent of unpredictability most of the organisations are opting for Contract Labours rather than hiring permanent employees.

To produce cheaper products and compete in the global market effectively, organisations have started using Contract Labours everywhere even in their core activities. The engagement of contract labours is way more beneficial and cost effective than in comparison to regular workmen. In a stringent labour market where supply of labour is also inadequate the contract labour seems very convenient for the investors. Thus, for such convenience the premium paid to the contractor for supply of labour seems very less. The investor sees the contract labour as human resource in very less cost to the company because he can settle it by paying them less wages and other social security benefits. One of big benefits of engagement of contract labour is their non-unionisation which also helps the investor to counter the unions of the regular workers. In addition to this, the system is such that it provides the required flexibility to the industries to adjust the number of labours for a particular time with respect the demand of the market. This leads to less cost to the company. The investors can engage as many workers as it wants for particular time period which is not possible with the regular workers. The contractor also is benefited by the commission or premium it receives from the investors. He also receives charge and over charges on transport, accommodation and loan. For employment and lesser availability of jobs, the unemployed workers are forced to accept contract employments. The contract labour system is inalienable from any business process. It is so inherent to the business process that no employer can afford to have an industry running without contract labours.

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[2] Indeed Editorial team, "What Is Industrialization? (With Benefits and Challenges)",2023 *Indeed* available at https://www.indeed.com/career-advice/career-development/industrialization.

[3] S.P. Mukherjee, Labour: The Lever of Development in: *V.V. Giri, Role of Labour in India's Development*. (Noida: Chandu Press 2022) at 1-5

The service condition of Contract Labour in India has always been on discussion. Because this system has lends itself to various exploitation[4]. Starting from the pre-independence era till today these contract labours are being exploited by both the contractor and the principal employers. The Contract Labour (Regulation and Abolition) Act, 1970 was enacted in the Year 1970 (Hereinafter CLRA 1970) to govern the employment of contract labours in India. It was passed by the parliament on 5th September 1970, with an objective to regulate the process of engagement of contract labour and to abolish the same when and wherever it is possible. In addition to this the idea of enacting this piece of legislation was to prevent the ongoing exploitation of contract labours employed throughout the pan India and to secure to them a better and humane working condition.

This Act has not only given new dimension to the employment of contract labour but also have empowered them and their social status to some extent. However, there are many loopholes in the statute which has also been a tool for their exploitation. It is considered as a complete Act in itself but when properly analysed it seems to be insufficient on many counts. Such as, it is unable to provide proper meaning to many words and phrases used in the Act and has given lots of cross references. Which naturally would lead to ambiguities and a sheer state of confusion. Words and phrases like sham and camouflage, same or similar are nowhere defined in the Act or rules. This must be the reason the Court had to interpret the word and phares provided in the statutes. However, the Court has failed to give the exact meaning of many of the words and phrases. Which again leads to further litigations and the court is back in the same place it has started its journey.

The legislature left a gap in the existing legislation on the issue of absorption. Perhaps the idea was to leave it to the employer to decide. But the plight of contract labour became worse in the absence of clear-cut guidelines. There was an inherent weakness in the Act and therefore correction is required through judicial activism if the legislature fails to do so. The security deposit asked from the contractor is too less i.e., insufficient to suffice the need at the time paying the unpaid wages to the contract labours. The security deposits can't be increased because it will adversely affect the small contractors.

The procedure given to obtain the registration and license is arduous and complex in nature. It involves too many rules and forms which again leads to unnecessary complexity. Again, the punishment given for the offence under this Act is too little, which fails to deter the employer and the contractor from committing the offences. The whole Act speaks for workman from both the gender, i.e., both male and female but it remains silent when it comes to the transgenders. It seems to be one of the lacunae of the statute to ignore to recognize the status of a transgender contract labour.

The authorities from the government are vested with utmost powers to regulate the affairs under the statute. Many things such as grant of RC to license, inspection of the premises is done by them and for this all the other players depend on their mercy. It puts them into such a position where it becomes easier for them to indulge in corrupt practices. But the statute does

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[4] SN. Mishra, *Labour & Industrial Laws.* (Allahabad. Central Law Publication 2021) at 1086

not provide any measures to counter such corrupt practices. It should have some penal provisions even for the Government officials who exploit their power to earn illegal benefits.

From the above it is clear that the current law has many flaws and needs corrections. It was even felt by the planning commission in the second five-year plan that the law relating to contract labours needed to be changed. As a result of which a new law has been drafted and incorporated into the Occupational Safety and Health and Working Condition Code, 2020, which will govern the contract labour system once it is enforced. The pertinent question at this juncture is, whether the new law will enable the contract labours to have a better working condition and can prevent the ongoing exploitation against them? The answer to this question needs an analysis of the provisions of the draft Code based logical predictions and assumptions. The provisions relating to contract labour in the Code and its implications in the future are deliberated here after.

The structural framework and the future implications of the Occupational Safety and Health and Working Condition Code, 2020

The OSH & WC Code 2020 has subsumed different statutes. After its commencement all such statutes will be repealed automatically. Like other statute the Contract Labour (Regulation and Abolition) Act, 1970 will also cease to exist after it comes into operation. It has given a new structure to the old laws. Though new law will certainly remove the existing law however the new law is a super structure of its parent law[5]. The New laws under the OSH &WC Code 2020 brought many changes as compared to its parent law. Many such changes were brought because the parent law is old, insufficient, lacking. There are gaps which are clear impediments for implementation. Thus, to fill up the existing gaps the new law brought new provisions as well as deletion of many old provisions, which is as follows.

Application

The Code in part I of Chapter XI deals with the special provisions regarding employment contract labours. Once it is implemented, it shall be applicable to all such establishment wherein fifty or more contract labours are/were employed on any day of the preceding twelve months and to a manpower supply contractor who has employed fifty or more contract labour on any day of the preceding twelve month.[6] But this part shall not apply to an establishment where the work performed is of intermittent[7] and casual nature.[8]

Whereas the existing law the number of workers is twenty instead of fifty[9]. All the other concepts relating to intermittent and casual nature of works remains the same. The reason for the increased limit may be because Indian trade policies have been criticized many a times for not being so much investor

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[5] Here Parent Law or existing law denotes the Contract Labour (Regulation and Abolition) Act, 1970

[6] See Section 45 (1) of OSH&WC Code, 2020.

[7] See Explanation to Section 45 of OSH&WC Code, 2020, 'Intermittent work' means "*A work performed for not more than 120 days in the preceding twelve months or if it is of seasonal nature, it must not be performed more than 60 days in a year."*

[8] See Section 45 (2) of OSH&WC Code, 2020.

[9] Section 1(1) of The Contract Labour (Regulation and Abolition) Act, 1970 (Short Title)

friendly and hence there was not much investment done in the past decades. The recent Government with the intention to bring more investment has changed it's trade policies to a greater extent. The legislature to promote the large-scale industrialisation and ease of doing business has tilted towards investor's side. It has become investor friendly to alure more and more investor (domestic as well as International) to invest in India.

From the Principal Employer's and Contractor's point of view it will be very beneficial because the PE[10] and the contractor engaging less then then 50 shall not have to take a labour licence. The labour license sometimes puts both of them in a very vulnerable condition because there are penal provisions for both of them if there is no licence. Also, getting a licence is also tough task because it seeks different procedural necessity. Thus, a number less than 50 is a win-win situation for both. It is good news for the investors because there will be no more trade barriers and it will provide a smooth-straight road to run their business. However, from the perspective of the Contract Labour it looks to be very unjustified. A Labour Licence brings guarantee of good condition of work and a protective shield from undesired exploitation caused by the PE and the Contractor. In the new law if the numbers of workers go below 50 the law will not be applicable, nor a licence is required. Thus, it will put those hand full of workers under numerous dangers of getting exploited by both the big players.

The definition part is known as dictionary for that particular statute[11]. For better understanding and interpretation of different provisions of a statute, it is always essential to read the relevant definitions. The significance of a definition[12] is usually the crystallisation of legal concept promoting precision and rounding off blurred edges[13]. The definition given in a legislation is meant to lay down a separate vocabulary for the purpose of carrying and expressing the effect the object of the legislation. The definition sometimes is inclusive, sometime exclusive and sometimes relative. Expression defined in the legislation must be given the same meaning through the legislation[14], unless the context otherwise requires[15]. A word define in the legislation must be given the only meaning assigned to it by the legislation. It is not possible to look into the presumed intention of the legislature[16]. The Code[17] has brought many changes into the definition part by addition and alteration, which is as follows,

Contract Labour

In the Code a Contract Labour[18] means "*a worker who is hired in or in connection with such work of the Establishment by or through a contractor, with or without the knowledge of the principal employer (PE) and which includes an inter-State migrant worker. But it doesn't include a worker, other than part time employee, who is employed regularly by the contractor for any activity of his*

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[10] PE denotes Principal Employer
[11] PK. Padhi, *Labour and Industrial Laws*. (Delhi: PHI Learning Private Limited 2019) at 291
[12] K Srivastava, *Commentaries on Contract Labour (Regulation and Abolition) Act, 1970. (Delhi: Eastern Book Company 1982) at 48*
[13] Bangalore water supply & sewerage board v. A Rajappa, (1978) 2 SCC 213
[14] Hajipur central co-op. union Ltd v. Kamla Pd., AIR 1937 Pat 531
[15] S.K. Gupta v. K.P. Jain, (1979) SCC 54
[16] Maharaja of Jaipur Museum Trust v. State of Rajasthan, AIR 1971 Raj 151
[17] Here Code denotes the OSH & WC Code 2020
[18] Section 2 (m) of the OSH & WC Code 2020

Establishment and where his employment is governed by mutually accepted standards of the condition employment (including engagement on permanent basis), and he gets social security coverage, periodical increment in pay and other welfare benefits."

The new definition[19] in OSH & WC Code has brought some textual change by making further addition into the definition[20] given in the CLRA Act 1970. It has integrated an inclusive part and an exclusive part into the new definition. In the inclusive part it provides to include interstate migrant workers within the definition of Contract Labour. Whereas it excludes worker from being called as a contract labour who is employed by the contractor for any activity of his Establishment on regular basis. His employment is governed by the mutually accepted standards of the condition of employment, and which also includes engagement on permanent basis. In addition to this he also receives periodical increment in pay, social security coverage and other welfare benefits.

The reason of these new parts is to make the definition clearer and more precise so that there shall not be any ambiguity. In the pervious law there was no mention of the interstate migrant workers however to benefit them the law has included them under the definition. To stop the exploitation against the Contract labours the law has tried to exclude a category of worker from the purview of the definition.

No change can be seen in the initial part apart from the exclusion and inclusion. The inclusion of interstate migrant worker won't bring any big change. if the Contractor for his benefit make some arrangements through which he can make an excluded category worker to work for the principal employer, then, it doesn't look to be a welcome sign for the contract labours. Because these workers can't avail the benefits of the laws and will fall prey to the hands of the management as well as the Contractor. This will lead to a disastrous consequence because the law is framed to protect the Contract Labours from exploitation and to give them a good working condition but on the other hand it will provide ways to make their conditions further vulnerable.

Contractor[21]

The Definition is exactly same as the parent Act. It says that *"Contractor in relation to an Establishment a person who undertakes to produce a given result for the principal employer' Establishment (other than a mere supply of goods and articles to the principal employer's establishment) or who supplies contract labours for any work of the principal employer's Establishment as mere human resource. It also includes a sub-contractor".*

Principal Employer[22]

The definition of principal employer in Both the CLRA Act 1970 and The OSH & WC Code 2020 are exactly same. So, no changes can be seen so far as the status of the PE is concerned.

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[19] Section 2 (m) of the OSH &WC Code 2020
[20] Section 2(1) (b) of The Contract Labour (Regulation and Abolition) Act, 1970
[21] Section 2 (n) of the OSH &WC Code 2020
[22] Section 2 (zz) of the OSH &WC Code 2020

Wages[23]

In the CLRA Act 1970[24] Wage is not defined but it gives a cross reference to Payment of wages Act 1936[25]. The wage Code 2019 for the first time has changed the definition of wages to a greater extent. It can be clearly visible from the new wage definition that the inclusive and exclusive components for calculation of wages have been drastically changed. The Wage Code 2019 under section 2(y) has defined Wages. All the rest three codes bear the same definition.

Today's almost every existing Labour Law contains a different definition of Wages. Each of the definition is constituted of different component which may or may not be same for all. It has created enough confusion because for every Act the meaning is different. So, whenever a person is looking for the definition wages, he has to refer to the particular legislation he is dealing with. No other definition can suffice his needs. But in the new Labour Codes the wage definition is same for all and which will be easier for the reader to interpret it without going into any state of confusion.

Core Activity[26]

Core activity is not defined anywhere in the CLRA Act 1970 but The OSH &WC Code has brought it into its definition part. Core activity of any Establishment is the activity for which such organisation is set up. It also includes all the other activities which are necessary or essential in nature to perform the core activity. But there is a list of activities given within the definition which shall not be considered as core activity of the Establishment if the establishment is not established to do that sort of activity.

The Code provides for the prohibition of employment of contract labour in the core activity of any establishment. This definition is added to support the provisions given under section 57 of the Code. Core activity is not defined anywhere in the parent Act, however, there are many decisions Supreme Court and reports of the Labour commission which has clear mentions of "Core Activity". The Hon'ble Finance minister in 2001-02 budget has talked about protection of labours engaged in outsourcing activities and mentioned about core and non-core activities. The Supreme Court in Barat Fritz Werner Ltd. v. State of Karnataka also mentioned Core Activity. Thus, it must have been felt necessary in the part of the legislature to insert the definition in the new Code. This definition will bring more clarity into the provision under section 57 of the Code.

The Advisory Boards

Just as in the CLRA Act 1970, The new Code has also provisions to constitute Occupational Safety and Health Advisory Boards, such as, The National Occupational Safety and Health Advisory Board and State Occupational Safety and Health Advisory Board.

Registration of Establishment[27]

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[23] Section 2 (zzj) of the OSH &WC Code 2020
[24] Section 2 (1) (h) Of CLRA Act 1970
[25] Section 2 (vi) of Payment of wages Act 1936
[26] Section 2 (p) of The OSH & WC Code 2020
[27] Chapter-II of OSH & WC Code 2020

Chapter II of the Code provides for registration of new as well as existing establishments to which this Code is applicable. The provisions relating to registration in the new Code is almost the same as the parent law, but it is multifaceted. Because it provides for the registration of Establishment as a factory, mine, building and other construction work and dock work. Any Employer can apply for registration in Form-I. The Form also asked about the details of the contract labour and the contractor.

Currently there are several enactments with numerous rules and forms which cause nothing but sheer complexity. The National Commission on Labour too has suggested an amalgamation of the alike laws. This Code subsumed many of them and club them together to reduce the complexity and difficulty. Lesser laws, rules and forms will be more beneficial, being easier to interpret and execute.

Licence

Employer in its Establishment should not engage any contractor, who employs contact labours to perform work without a valid labour licence. A valid Labour licence is always required before commencement of work. Currently the law under section 12 of the CLRA Act only talks about one type of licence which is valid only for one year. It must be obtained by getting a workorder form the principal employer. But the new Code provides for different licences, such as, Work Specific Labour Licence, Without Work Specific Labour Licence, Work Specific Licence for multiple States or pan India, Work Specific Licence for a particular State. In future licence shall be valid for maximum 5 years or for the duration of the work.

The licence in the parent law is only for 1 year and the same involves a very slow and complex process to obtain it. After the expiry of the licence the contractor must renew it again and must go through the same process. As per the current law without work order a licence can't be issued. Thus, there is no remedy for a manpower supplying contractor to get a licence in advance for any upcoming work. However, in the Code the new licencing process would bring more benefits for both the principal employer and the contractor. Thus, whenever work comes, the contractor is readily available with their pre-equipped licence. The licence to engage contract labour in pan India has also opened new avenue for the contractors to grow their business. Again, the validity of the licence is for 5 years so there will not be requirement of renewal of licence once in every year.

Prohibition of employment of contract labour

The laws of voluntary prohibition by the appropriate government under the existing law have been removed in the Code. The Code directly prohibits the engagement of contract labour in core activity of any establishment. The concept core activity is introduced for the first time in this Code. However, employer can engage contract labour in its core activity subjected to certain exceptions mentioned in the Code[28].

The law relating to prohibition in the CLRA Act is clustered with ambiguity and uncertainty. It is not clear and very complex, wherein the appropriate government is vested with absolute power to bring prohibition order.

[28] Section 57 (1) (a), (b), (c) of the OSH & WC Code 2020

In last 4 decades many people including the contract labours have suffered from the unnecessary decisions by the appropriate government leading to plethora of cases pending in the Courts. The decisions also took many twists and turns and thereby it has brought hardship to the contract labours and the investors. However, the code has removed this complex process of voluntary prohibition by the appropriate government by directly stating that contract labour shall not be engaged in core activity of any establishment.

Though it is a good step to reduce the complexity revolving around section 10 and has also pave the way for recruitment of permanent worker in the core activity, but the exception given under section 57 has failed purpose of the section. The exceptions allow the contract labours to be engaged in core activity. By simple manipulation of the conditions given in the exception contract labour can be easily engaged throughout the year. So, the new law brings no justice for the contract labours.

Penalty

In case of any contravention of the provision of the Code, the employer or the PE, shall be imposed with penalty which shall not be less than 2 lakh or may extend to 3 lakhs rupees. On occurrence of further offence, a penalty of 2 thousand rupees shall be imposed for every day till such contravention of the Code continues.[29] Similarly, any offence committed by the employer as a company, the person in-charge shall be penalised. All such person involved in the offence shall be equally liable.[30]

Concluding Observations:

The OSH & WC Code 2020 is an amalgamation of different statutes. After its enforcement all such statutes will automatically cease to exist. Many things are amended, and new things are also included into the Code. However, it can be seen that there are many provisions which could have been put in a different way to give better benefits to the contract labours. The notable changes suggested are as follows:

- It is an amalgamation of different existing statute such as contract labour, factory, mines, plantation etc. Thus, it includes all the provisions of all the statutes. Different chapters have been created for different areas. But there are a few parts in the Code which is common to all the chapters. Some time it becomes a bit complex to connect them together. However, it is a good endeavor by the government to reduce the existing complexities.
- The same way the Code talks about common registration and licensing forms for all kind of establishment. Which is good on one hand but a bit complex on the other. But hopefully once it comes into operation people will get acquainted with it. Currently it is hard to predict the exact impact of this kind of common forms.
- The definition part in the Code has also brought many changes. But few definitions are just the same as the current law. The changes that are brought will hardly have any impact on the contract labours. It is just the same as earlier, only a few things are added unnecessarily. For example, the

[29] See Section 94 of the OSH&WC Code, 2020.
[30] See Section 109 of the OSH&WC Code, 2020.

definition of contract labour is added with a few more things which is going to change nothing.

- It has included the third gender workers in the Code. Which seems to be additions to promote the rights of the third genders.
- Currently the law relating to prohibition and abolition are full of ambiguities. But the Code made it very specific by bringing the word core activity. It directly provides that no employer can engage contract labour in its core activity. This has made the law clearer and unambiguous. But there are different exceptions attached to the prohibition part. If the establishment fall under such circumstances, it can engage contract labours even in core activity. Which doesn't look to be in the favour of the contract labours.
- The Code doesn't give any cross reference to any other Code or Act. Which has reduced the chances of future complexities. The Code is made to be complete law in itself. The security deposits are enhanced in terms of money and for the unpaid balance the contract labours could be paid from such security deposits, if not paid by the contractor. It has given relaxation to the principal employer in case the contractor absconds. However, the security amount is very low to pay even one month salary to a contract labour.
- The new structure of licensing has been added into the Code where the contractor can take advance license even without a work order. Which is quite a bit lucrative for the principal employer and for the contractor. However, it is in no way beneficial for the contract labours.
- The Code provides for a greater degree of punishment than the existing laws which is added to deter the employers from committing any offence. But still, it doesn't look to be that potent to deter them from committing any offence. There shall be provision for revocation of license and registration in case of contravention by the PE or the contractors.
- The Code provides punishment for offences committed by the government official, which is also a good endeavor by the Government because it can deter them from making any contravention of the provisions of the Code.

The new Code is drafted to bring changes into the existing laws so that the gaps in the law can be filled and the emerging issues could be solved. There is no doubt that the code has not only brought many changes into the existing laws but also introduced different new concepts. It can be assumed from the draft Code that it will have some good impact on the labour force. However, the Code has repeated the same provisions from the current laws which are part of the problem. The new concepts are untested, hence, to what extent it would be implementable that's remain an answered question. Many times, it is seen that the existing gaps in the current laws remain as it is in the Code.

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GUARANTEE OF THE RIGHT TO LIFE AND PERSONAL LIBERTY UNDER ARTICLE 21: AN ANALYSIS

Omendra Singh*

Abstract: The study acquires tremendous relevance because the right to life and personal liberty is the most treasured and crucial fundamental human right around which other individual rights circle. Understanding the right to life means the Supreme Court as a whole defender of basic human rights. The most well-known clause in the Indian Constitution, Article 21, holds a special place among the fundamental rights. It is enforceable against the State and gives both citizens and noncitizens the right to life and personal liberty. A new era of expanding the horizons of the right to life and personal liberty has begun as a result of the new interpretation of Article 21 in the Maneka Gandhi case. The current vast scope of this covers a variety of features which our Constitution's founding fathers may or may not have imagined that are currently covered by the broad perspective given to this.
Keywords: Constitution of India, Article 21, Life and Liberty.

Introduction:

A new examination of the concept of the right to life and personal liberty is necessary in light of the aforementioned revolution in the fundamental idea. This examination must take into account its development, meaning, breadth, and depth as well as judicial interpretation, the justification for such a liberal interpretation, and the relationship between Article 21 and the provisions of Article 32, as well as directive principles of national policy and international human rights instruments. Additionally, the preservation of this privilege is a current, hot topic. In this essay, an effort has been made to look at the contemporary norms used to preserve the right to life. Article 21 provides that, "No person except according to procedure established by law shall be deprived of his life or personal liberty."[1]

The Liberty

The fundamental requirement of human life is liberty[2]. The Latin word "Liber," which meaning "free," is where the term "liberty" originates. In this context, liberty refers to the absence of restrictions and the ability to behave however one pleases. The issue of liberty has been discussed by philosophers since the beginning of time. "A polity where there is the same law for all, a polity administered with regard to equal rights and equal freedom of speech, and the idea of a kingly government which respects most of all the freedom of the governed," wrote Roman Emperor Marcus Aurelius (121–180 AD).According to Article 21 of the Constitution, "life" is not only the physical act of breathing.[3]

That interpretation of liberty was criticized by John Locke[4] (1632–1704). Without referencing Hobbes by name, he criticizes Sir Robert Filmer, who had

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[1] Article 21 – The Constitution of India.

[2] E. Asirvatham, Political Theory, 10th Ed. 168 (S Chand Publishing, New Delhi, 2000)

[3] Marcus Aurelius, Meditations, Wordsworth Classics of World Literature, 40(Oxford University Press, 1998)

[4] John Locke, Two treatise of Government, 29(Whitmore & Fenn, London, 1821) Excerpts from A Translation into Modern English, 76(2009).

the same definition. According to Locke, liberty in the natural condition refers to being free from any higher power on Earth. Persons are not subject to the will or judicial authority of others, but instead are governed entirely by the laws of nature. In a democratic society, liberty means not being subject to any other legislative authority than that granted by the commonwealth. Apart from the laws passed by their own duly constituted lawmaking power in accordance with the trust placed in it, people are free from the domination of any will or legal restraint.

According to G.D.H. Cole[5], "Liberty is the freedom of individual to express, without external hindrances, his personality."

Personal Liberty

Personal liberty, in Blackstone's words, "consists in the power of locomotion, of changing circumstances, or of moving one's person to whatever place one's own inclination may direct without imprisonment or restraint except by due process of law."[6]

Justice Mukherjee stated that personal liberty is the opposite of physical restraint or coercion since it "means liberty relating to or concerning the person or body of the individual." Personal liberty refers to the right to be free from all forms of physical coercion, including incarceration, arrest, and other forms of bodily restraint that cannot be justified by law. This wrongdoing right is what defines personal liberty.[7]

Justice Subba Rao defined "personal liberty" as a person's right to be free from restrictions or intrusions on his person, whether these are directly enforced or indirectly brought about by calculated means, in Kharak Singh v. State of U.P[8].

The Supreme Court of India broadened the definition of "personal liberty" as used in Article 21 of the Indian Constitution in Maneka Gandhi v. Union of India[9]. The Court noted that the term "personal liberty" in Article 21 has the broadest scope and encompasses a variety of rights that together make up a man's personal liberty, some of which have been elevated to the status of distinct fundamental rights and are further protected under Article 19[10].

Life

According to the Oxford Dictionary "Life"- It is a condition that distinguishes animals and plants from inorganic matter, including the capacity for response, growth, reproduction, functional activity, and continual change preceding death. Every society has different norms to protect the human life and dignity of individual. The right to life denotes the significance of human existence for this reason. It is widely called the highest fundamental rights.

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[5] J.S.Badyal, Political Science, 81(Swan Printing Press, Jalandhar, 2017)
[6] William Blackstone, Commentaries on the Laws of England, Vol. 1(134)
[7] A K Gopalan v.State of Madras, AIR 1950 SC 27
[8] AIR 1963 SC 1295.
[9] AIR 1978 SC 597
[10] Ibid.

Judicial Interpretation of Life

In K.S. Puttaswamy and another v. Union of India and Others[11] dignity has been reaffirmed to be a component under the Article 21. Justice Dr. Chandrachud observed: "Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are constantly shaped by the social milieu in which individual exists. The duty of the State is to safeguard the ability to take decisions- the autonomy of the individual- and not to those dictate those decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life as much within the protection of the guarantee of life."

Concluding Observations:

The extensive analysis of Article 21 of the Indian Constitution is part of our life. Its scope includes historical, political, and other socioeconomic elements that contributed to the creation and growth of Article 21. The study is where the ideas of privacy, life, and individual freedom first emerged. Sincere efforts were made to conduct a study of Article 21 and its evolving contours, with a focus on right to life. Its scope covered socioeconomic, political, and historical elements that contributed to the formation, growth, and legal acknowledgment of right to life and the right of personal liberty as well as the origin and development of Article 21.

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[11] (2017) 10 SCC1.

THE COVID-19 PANDEMIC AND ITS EFFECT ON TRANSGENDER PEOPLE

Shambhu Kumar*

Abstract: The COVID-19 pandemic has hit all sections of human society, but among the worst affected are transgender people. Their plight has not drawn as much attention as its debilitating effects on the community warrant. There are some social media posts that describe incidents of protest, harassment and violence, but broadly both the Indian state and society have ignored the inhuman treatment of their fellow citizens, apparently simply because they are transgender people. The new pandemic and the extant social discrimination hit the transgender community in a double whammy. Restrictions on mobility and an indefinite ban on ceremonial events involving singing and dancing deprived transgender people of their daily earnings, and they were in dire need of immediate financial compensation in order to survive.
Keyword: Transgender persons, COVID-19 pandemic, Debilitating Effect, India.

Introduction:

India's COVID-19 lockdown has left transgender people at heightened risk of hunger and poverty since most of them make their living on streets by begging, street entertainment, and paid sex. They are not socially privileged to operate within the online world as they are predominantly dependent on social interactions and functions such as weddings or baby showers. Ideology is endangering transgender people from corona virus. Transgender people are a socially marginalized community who is forced into slums where social distancing is challenging, making it a hotbed for Corona virus. Further, the absence of health care backup and lack of awareness increases the looming fear among the transgender community regarding the budding impact of COVID-19[1].

Transgender people need help during this pandemic from a multiple set of people such as government, community, healthcare workers, administrators, as well as NGOs. They can be empowered by providing them with the essential medicines such as hormones and HIV medicines, enrolling them in various health schemes, as well as providing the jobless with money and food, and generating funds targeted for transcommunity. The media should aware people and the government regarding the problems faced by transpeople during the pandemic, giving them a voice. The stigma attached to them should be curbed, and the people who are intentionally spreading rumors and attacking their dignity should be held. The healthcare workers should be motivated to give special attention toward this marginalized group and provide them with essential care, mental health counseling, and consultation through telemedicine or special day clinics.[2] Especially during the second wave, as the COVID-19 outbreak around the country reached horrific depths, even begging in cities and on the highways became impossible. Many transgender persons suddenly confronted a reality in which they had no food, no money and no shelter.

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1.https://pesquisa.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-668662
2. Shaikh S, Mburu G, Arumugam V, Mattipalli N, Aher A, Mehta S, et al. Empowering communities and strengthening systems to improve transgender health: Outcomes from the Pehchan programme in India. J Int AIDS Soc 2016;19:20809.

This article highlights specific challenges faced by transgender persons in dealing with the COVID-19 crisis situation, response and relief operations in India. It points out specific needs of vulnerable and marginalized groups and the gaps in government responses to deal with the crisis between March and June 2020. It also highlights adolescents as a separate category while also prioritizing the needs of transgender persons who face multiple barriers to accessing relief systems and stigma and violence in public spaces.

Queer women, transgender, persons and increasing domestic violence during Covid19 pandemic:

Worldwide, nations have reported an increase in instances of domestic violence under lockdowns[3], with even the United Nations having called for urgent action[4]. On the contrary, The Union Minister Smriti Irani (The Minister for Women and Child Development and Textiles) denied claims that the corona virus induced lockdown led to an increase in cases of domestic violence against women. She reported that the government has 35 helpline numbers across all states apart from a central number that has been functioning fully throughout the lockdown period and the reporting is scaremongering done by the NGO sector. However, The National Commission of Women, India set up a WhatsApp helpline (+91-7217735372) in April to ensure women, who couldn't access emails or send complaints by post, could receive help. The Commission registered an increase of at least 2.5 times in domestic violence complaints since the nationwide lockdown[5].

Just as the pre-existing inequalities that harmed the queer community have been magnified by the crisis so too have the barriers that hindered transgender victims of domestic violence from effectively leaving violent relationships. The virus has disrupted normal social networks for transgender victims, who are more likely to utilize informal sources of support like friends or private therapists than traditional formal sources support like domestic violence charities or the police. Indeed, whilst there is, as of yet, no reports of an increase in arrests or prosecutions for transgender abusers, a significant number of individuals are coming forward to seek help from gay and trans-friendly support services. Gallop, Stone-Wall Housing, and the LGBT Foundation which offer services to queer victims of domestic violence are reporting huge surges in referrals and calls for help.[6]

Covid-19 Pandemic Impact on Transgender Communities:

On 30th January 2020, Director-General WHO declared the outbreak of novel corona virus as a Public Health Emergency of International Concern[7]. On the same day, India reported its first case in Thrissur, in Kerala[8]. On the evening of 24th March 2020, the government responded to the deprecatory situation and announced a 21-day nation-wide lockdown to combat Covid-19.

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[3] https://www.nytimes.com/2020/04/06
[4] https://news.un.org/en/story/2020/04
[5] https://www.thehindu.com/news/national
[6] https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/07
[7] World Health Organisation. (2020). Novel Coronavirus(2019-nCoV) Situation Report - 1
[8] Perappadan, B. S. (2020, January 30). India's first coronavirus infection confirmed in Kerala. The Hindu.

The Covid-19 pandemic and the nationwide lockdown that followed has been detrimental to the lives of transgender persons on multiple fronts -

1. Transgender individuals are often subjected to high degrees of emotional and physical abuse from family members and close relatives. Most of these cases however go undocumented due to the limited avenues present for transgender individuals to reach out for support and the manner in which these stories are reported in the media. This has become much worse as a result of the stringent lockdown guidelines due to which transgender individuals are being forced to stay at home with their abusers and perpetrators of mental and physical violence[9].
2. There have been reports of individual cases of LGBT+ persons being forced to get married despite revealing their sexual orientation to their families during lockdown and their inability to escape and go to a safe space. One such story that did receive media attention was the death of two women in Tamilnadu[10] by suicide. As per the report, the cause of death is speculated to be the pressure from the family of one of the victims to get married to a man.
3. There is a lack of institutional spaces for transgender persons who need to escape from violent family homes as well as a complete lack of mobility due to stigma around sexuality and the need to furnish clear reasons to the police or other authorities to be able to leave homes or be in public during stringent phases of the lockdown or in containment zones. Informal networks of activists that provide safe houses are not equipped to ensure testing or take responsibility for infection risk in cases for persons who need safety but have been unable to maintain physical distancing or other safety protocol while escaping violent and stressful situations.
4. In a 2017 study conducted by the Kerala Development Society on behalf of the National Human Rights commission of India it was found that 96% of transgender persons are denied jobs and are forced to take up low paying or undignified work for livelihood such as badhai (ritual blessing), sex work, and begging[11]. The nationwide lockdown and physical distancing restrictions due to Covid-19 has subsequently rendered transgender communities jobless in most parts of the country and further pushed them to the margins with no access to funds to support basic necessities like food, housing, and healthcare (particularly ART medication).[12]
5. Due to a lack of proper identification documents like PAN card, Aadhar Card, and Ration card etc. transgender people are unable to access social security schemes and government relief care packages which require some form of government identification document or linking Aadhar, the

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[9] Suchitra. (2020, May 8). In Urban Areas, Lockdown Leaves Members of Queer Community Stuck with Emotionally Abusive Families. The Caravan.

[10] New Indian Express (2020, May 18). Fearing separation, two women from Tamil Nadu's Namakkal end lives.

[11] ://nhrhttpsc.nic.in/sites/default/files/Study_HR_transgender_03082018

[12] Outlook India. (2020, April 25). Visibly invisible: The plight of transgender community due to
India's COVID-19 lockdown

biometric ID, to bank accounts as a precondition to receiving financial aid[13].

6. Some transgender people are also hesitant to access public spaces and seek relief benefits due to a growing fear of harassment by police officials[14] as cases of police brutality continue to rise in order to enforce the stringent lockdown guidelines.
7. Amidst the nationwide lockdown, the government also released the draft rules for *The Transgender Persons (Protection of Rights) Act, 2019* on 18th April 2020 with a 12-day deadline to submit any relevant inputs[15]. This is inconsistent with the Pre-Legislative Consultation Policy, 2014[16] which specifies that such information should be kept in public domain for a minimum of 30 days. The deadline was later extended to 18th May 2020 (still within the lockdown period) after criticism from various transgender rights groups and human rights activists across the country[17]. It should be noted that the draft rules were released online, and only in English, making the process of submitting feedback and inputs extremely difficult for a large number of transgender people in the country who do not have access to internet and are not fluent in English.
8. One of the very few measures of the government for transgender community was the issuance of an allowance of Rs 1500 from the National Institute of Social Defense. According to various transgender activists and media reports[18], this allowance reached only about 4500 transgender persons, roughly 1% of the total transgender population as per the 2011 census[19].

Socioeconomic Life And Psychology Impact Of COVID-19 On Transgender Persons:

War against the deadly invisible virus has opened a battlefront for the existence of millions of daily paid workers, especially the community of transgender people. India's COVID-19 lockdown has left transgender people at heightened risk of hunger and poverty. The transgender community is one segment of India's vast informal sector whose livelihood is entirely dependent on daily wages and gig jobs, including begging, street entertainment, and paid sex. The lost livelihood opportunities due to lockdown leave them vulnerable to unemployment and tragedy. The Finance Minister of India on March 26, 2020, extended a stimulus package[20] of approximately 22 billion USD for specific vulnerable groups, including people below the poverty line, disabled, older and widowed persons, daily wage earners and farmers leaving out targeted community of transgender people. However, the Kerala state government has

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[13] Raja, N., Waghela, P., & Dewan, F. (2020, April 15). As the world comes together, India's transgender community fights COVID-19 alone. Amnesty International India.

[14]Thakur, J. (2020, April 6). Coronavirus has compounded the Ostracisation of LGBTQ community. The Wire. https://thewire.in/lgbtqia/coronavirus-lgbtq-rights

[15] Thomas, R. (2020, April 28). Draft rules for transgender act threaten to undo NALSA judgement. NewsClick.

[16] http://legislative.gov.in/documents/pre-legislative-consultation-policy

[17] Singh, P. & Shankar, G. (2020, May 5). Modi govt releasing draft rules on transgender persons act in lockdown a blow to community.

[18] Hindustan Times. (2020, May 6). Transgender activists write to centre demanding support during COVID-19 crisis.

[19] TransGender/Others. (2020). Census 2011 India.

[20] https://www.indiatoday.in/coronavirus-outbreak/story/covid-19-centre-announces-rs-1500-assistance-for-transgenders-here-s-how-to-apply-1806448-2021-05-24

announced a relief kit (including temporary housing and food facilities) for 1000 registered transgender persons in its COVID-19 response strategy. Uttar Pradesh state governments have declared financial aid, including bulk rations, for the next six months. Even if the steps undertaken by Government are laudable, there is no mention of transgender people as beneficiaries in any of these propositions. On April 29, 2020, one transgender person died from COVID-19 in Indore. On May 3, 2020, Tamil Nadu reported a transgender person, the first in the state, affected by novel corona virus infection[21].

Since a majority of transgender people are solely reliant on dealing with public and community oriented jobs, they are walloped in the times of pandemic. Like daily wage earners, the transgender people also earn on an everyday basis from their gig jobs. Due to the pandemic scenario, the hand to mouth transgender people are adversely affected and are left out to rely on their savings. A Pune based transgender activist Sonali Dalvi voiced that, "Due to complete lockdown, the red light areas are closed, weddings and other forms of celebrations are cancelled or postponed, and shops are locked. The condition is very critical. I hardly had any customers in the past ten days. If things last like this way, then certainly, I will run out of cash and die out of hunger." Similarly, Sonam Nayak, a transgender person from Jaipur who is despondent with lockdown imposed by the government, stated that 'We are running cashless and are in extreme need of monetary assistance. There is no financial aid from the government, and we do not know for how long we can sit and eat like this[22].

The right to necessary healthcare facilities is a fundamental human right, which is over and over again denied to the community of transgender people. In the course of the COVID-19 pandemic**,** the consequences of denying the fundamental healthcare rights by healthcare professionals towards transgender are far-reaching. Societal stigma resulting in discrimination leads to the systematic exclusion of the transgender community from the healthcare sector. According to the National Centre for Transgender Equality (NCTE), the compromised immune system of transgender people is at a higher risk of corona virus infection. Lack of job opportunities and social exclusion push them into acute poverty, thereby depending on sex work and begging for their bread and butter. Consequently, the nature of their work makes them vulnerable to corona virus infection. Further, the visible discrimination in the provision of healthcare entitlements places transgender children as well as older transgender persons at a higher risk of COVID-19[23].

Community-based organizations, such as the Humsafar Trust, have been working to support disable LGBTQ+ individuals since March 2020. They provide financial aid, food and other basic needs, medical support and the availability of HIV medicines, etc[24]. The trans community somewhat lacks legal protection which gets translated into poverty, lack of identity documents which

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[21] Banerji, A. 2020. India's "invisible" trans community struggles as coronavirus shuts life down. *Thomson Reuters Foundation News*.

[22] Bhattacharya, S. 2020. Coronavirus Outbreak: Trans community's lives come to a standstill, but hope presents itself through welfare initiatives. *Firstpost*.

[23] Chakrapani, V., Babu, P., Ebenezer, T 2004. Hijras in sex work face discrimination in the Indian health care system. *Research for Sex Work*

[24] *The impact of stigma on Indian transgender people during Covid-19 - APCOM* (2020). Available at: https://www.apcom.org/the-impact-of-stigma-on-indian-transgender-people-during-covid-19

in turn resulted in harassment and stigma. Trans youth, who are students at university and young adults who have to return home may return to unwelcoming and unsafe surroundings[25].

Legal Framework Related To Transgender:

The government released the assessment known as the Draft Rules on the Trans Act, 2019 at a time when the community was fighting for bread and butter. These guidelines are an attempt to resolve the significant critiques that were made for the Act. Despite the protests, the fundamental fault remains quite unchanged. The rules do not derive the right, as confirmed in the NALSA judgment by the Supreme Court[26], to self-determination. Besides, the laws violate freedom of movement for transpeople, do not comply with the criminalization of provisions surrounding sex work and do not resolve the systemic obstacles to healthcare[27].

There is no binding legal framework at the international level which specifically refers to the principle of non-discrimination on the grounds of sex, or gender. Under international law, however, the obligations of States to protect LGBT rights are clear. Further, UN human rights bodies have consistently agreed that sexual orientation and gender identity are one of the forbidden grounds for discrimination under international human rights law.

The Principles of Yogyakarta are a collection of guidelines for international law on sexual identity and gender identities. The States party to the principles has to comply with applicable international law requirements. The principles aim at building an entirely different future for all people who were born free and equal in dignity and rights[28].

They effectively define the responsibilities that a State should comply with to allow transgender people to enjoy the human rights of everyone in society. They made recommendations to non-State actors, such as the UN framework for the protection of human rights, national human rights organizations, media, NGOs and founders promoting and upholding human rights. The principles address a broad range of issues of human rights, including the universality of human rights, non-discrimination, legal equality, the right to life and protection, right to privacy, equal and equitable treatment by police and courts[29].

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[25] *Covid-19 Sent LGBTQ Students Back to Unsupportive Homes. That Raises the Risk They Won't Return.* (2020). Available at: https://www.chronicle.com/article/covid-19-sent-lgbtq-students-back-to-unsupportive-homes-that raises-the-risk-they-wont-return/ (Accessed: 25 November 2020).

[26] National Legal Services Authority v. Union of India AIR 2014 SC 1863.

[27] CLPR | Trans Law Quarterly | Issue II - Centre for Law & Policy Research (2020). Available at: https://clpr.org.in/blog/clpr-trans-law-quarterly-issue-ii/ (Accessed: 25 November 2020).

[28] Are LGBT rights human rights? Recent developments at the United Nations (2020). Available at: https://www.apa.org/international/pi/2012/06/un-matters (Accessed: 23 January 2022)

[29] Introduction to the Yogyakarta Principles – Yogyakartaprinciples.org (2020). Available at: https://yogyakartaprinciples.org/introduction.

State government provisions for transgender persons during covid-19 pandemic:

The Ministry of Social Justice & Empowerment being the nodal ministry for Transgender Welfare has decided to provide a subsistence allowance of Rs.1500 to each Transgender person as immediate support to meet their basic requirements. This financial assistance will help the Transgender community to meet their day-to-day needs. NGOs and Community-based Organizations (CBOs) working for Transgender Persons have been asked to spread awareness about this step[30].

Any Transgender Person or CBOs on behalf of the Transgender Person can apply for financial assistance after providing basic details, Aadhar, and Bank Account number in a form[31]. This form is available on the website of the National Institute of Social Defence, an autonomous body under the Ministry of Social Justice and Empowerment. To ensure that the information about this reaches a maximum number of Transgender Persons, this form is also being circulated on social media with the help of NGOs and CBOs. The Ministry provided similar financial assistance and ration kits to Transgender persons during lockdown last year too. A total amount of 98.50 lakh rupees was incurred which benefitted nearly 7000 Transgender Persons across the country[32].

The transgender community's long-standing demand for separate treatment facilities in hospitals has got a response during the coronavirus crisis — the health department of West Bengal has kept 10 beds reserved for the community members at the government's COVID hospital named MR Bangur Hospital in Kolkata[33].

On May 21st, Manipur opened its first transgender quarantine centre in Imphal to accommodate its transgender population who were coming into the city from different parts of the country[34].

In Kerala, ration kits were distributed by the state government to a large section of the transgender community[35].

On behalf of the Tamil Nadu State's Cooperation, Food, and Consumer Protection Department, the government has announced a scheme to provide Covid-19 cash relief of Rs 4,000 to all the rice-ration-cardholders. The first instalment of Rs 2,000 is being provided this month[36].

The Bihar government provided some aid in the form of shelter for them, but most transgender persons have yet to benefit from the scheme. But the situation was worse in Uttar Pradesh. This is India's most populous state,

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30 https://www.newindianexpress.com/cities/delhi/2020/may/22/transgenders-plight-during-coronavirus-pandemic-2146509.htmll

31 https://forms.gle/H3BcREPCy3nG6TpH7.

32 https://vikaspedia.in/news/government-to-give-assistance-of-rs-1500-to-each-transgender-person-in-view-of-covid-pandemic

33 https://www.timesnownews.com/mirror-now/in-focus/article/10-beds-reserved-for-transgender-community-in-kolkata-to-prevent-harassment-instill-security/584273

34 http://theleaflet.in/covid19-telangana-hc-orders-free-food-grains-medicines-to-transgender-comminute-without-insisting-on-a-ration-card

35 https://nenow.in/opinion/plight-of-lgbt-community-during-covid-19-pandemic.html

36 https://indianexpress.com/tamil-nadu-govt-madras-hc-7324458

and also accounts for 28.18% of India's transgender persons the highest among all states. In Lucknow, LGBTQ rights activist Arif Jafar said that the state government didn't provide any aid to the transgender community. After the second wave began, transgender persons were left homeless and hungry because all their sources of income had evaporated. Jafar told "A few NGOs came to their rescue, by distributing rations, but it was not sufficient for the larger, dispersed transgender population living on the margins of society." Jafar singled out the efforts of the international NGO Action Aid, which helped arrange to provide rations to transgender persons in Unnao, Barabanki, Kanpur and Lucknow[37].

Support From Judiciary to Transgender in Covid -19 Widespread:

The Covid lockdown has clearly impacted the most marginalized Indians, with a new report predicting that 400 million are likely to sink deeper into poverty. The media have extensively reported the condition of migrant workers and the homeless.

But what has escaped attention is how the transgender community, among India's least literate and discriminated communities and largely dependent on begging and sex work for its livelihood, is struggling to make ends meet during this time.

The Karnataka High Court is the first High Court to recognize this need, and on 9 April 2020 ordered that two months cash relief, in the form of social security pension, be made available to them and asked the government to also consider providing free rations. The Karnataka High Court has been having virtual hearings on several public-interest petitions for relief during the lockdown in Karnataka. These petitions include: making available enough masks and protective equipment for health workers; providing relief for migrant workers and care for pets and stray animals[38].

Grace Banu Ganesan v. State of Tamil Nadu[39] Transgender rights activist Grace Banu has filed a public interest litigation (PIL) petition in the Madras High Court seeking a direction to the State government to provide the COVID-19 relief amount of ₹4,000 even to transgender persons who do not possess ration cards. The litigant also insisted upon holding special camps to vaccinate transgender persons after dispelling all their doubts regarding the supposed adverse effects of vaccination.

Veera Yadav v. Chief Secretary, Government of Bihar & Ors[40] On the 27th of August 2020 the High Court of Patna ordered the Social Justice Department, Government of Bihar to respond with the steps that were taken by the government for protecting the rights of transgender persons. In response to which the Social Justice Department responded by saying that they had provided direct benefit transfer to 161 transgender persons in Bihar, while the total population of transgender persons in Bihar is 40,827. Thus Bihar

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[37] https://thewire.in/lgbtqia/the-covid-19-pandemic.

[38] https://www.article-14.com/post/a-high-court-steps-in-for-a-covid-hit-destitute-community.

[39] Write petition No.6052/2019, Date 18/02/2019, Status- pending(PIL)

[40] Patna High Court CWJC No.5627 of 2020(4) Date 20/05/2020 Status- pending.

Government provided financial assistance to only 0.03% of the transgender persons in Bihar.

The Rajasthan High Court has directed the State authorities to take appropriate steps for Vaccination of transgender persons in the State against Covid-19.Justice Vinit Kumar Mathur and Justice Sangeet Lodha was dealing with a plea seeking directions to the respondent authorities to facilitate COVID-19 vaccination for transgender of the State of Rajasthan[41].

The High Court in Delhi however declined to even entertain a plea to provide welfare measures to sex workers and members of the LGBTQIA+ community[42]. The court did not provide detailed reasoning behind its rejection of the plea, which sought direction from the central and Delhi governments to provide sex workers and queer individuals with food, accommodation and other resources. The plea also sought to create a dedicated helpline for queer individuals' experiences of mental health crises.

In the face of the COVID-19 lockdown, the Telangana High Court recently directed the state to ensure free supply of essential commodities and medicines to members of the transgender community, without insisting on production of ration cards/white cards43.

Concluding Observations:

The transgender community is one segment of India's vast informal sector whose livelihood is entirely dependent on daily wages and gig jobs, including begging, street entertainment, and paid sex. Since a majority of transgender people are daily-earners, social distancing, the only way to get rid of the claws of the virus, has struck them. Consequently, lost livelihood opportunities during COVID 19 lockdown leave them vulnerable to the transgender community is one segment of India's vast informal sector whose livelihood is entirely dependent on daily wages and gig jobs, including begging, street entertainment, and paid sex. Since a majority of transgender people are daily-earners, social distancing, the only way to get rid of the claws of the virus, has struck them. Consequently, lost livelihood opportunities during COVID 19 lockdown leave them vulnerable to unemployment and tragedy. Lack of essential documentation, including Aadhaar, ration card, voter ID, or bank account does not certify them to come under the coverage of government welfare schemes as well as social security schemes such as the provision of rations and pensions which makes it unbearable to endure in these tough times of lockdown. Consequently, a prolonged situation of today's type may be proved to be a silent killer by worsening the socioeconomic status and psychological state of the transgender people. Since they have been slowly gaining their legal and social

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[41] https://www.livelaw.in/news-updates/rajasthan-high-court.

[42] The New Indian Express. (2020, May 11). Delhi HC declines to entertain PIL on protection of sex workers, LGBT members during lockdown. ttps://www.newindianexpress.com/cities/delhi/2020/may/11/delhi-hc-declines-to-entertain-pil-on-protection-of-sex-workers-lgbt-members-during-lockdown-2141984.html

[43] https://www.barandbench.com/news/litigation/covid-19-lockdown-ensure-free-foodgrains-medicines-to-transgenders-without-insisting-on-production-of-ration-cards-telangana-hc-to-state.

identity, they are not to be left with their luck during the current pandemic situation so that whatsoever identity they have established will be in vain[44].

Moreover, there should be precise policy prescriptions for the interest of the said community so that they will be more than the daily earners. It must be ensured that, in days to come, transgender people are educated enough in order to be eligible for a befitted job so that they can work from home during quarantine and do not depend on menial jobs for their Slivelihood[45].

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[44]COVID-19, 2020a. Appeal for Immediate Measures for The Transgender Community in India to Deal with The COVID-19 Pandemic. (n.d.). . *Amnesty International India*.
[45] COVID-19 2020b. As The World Comes Together, India's Transgender Community Fights COVID-19 Alone. *Amnesty International India*.

COMPARATIVE ANALYSIS OF THE INDEMNITY CONTRACT IN INDIAN LAW AND ENGLISH LAW

Gaurav Kumar*

Abstract: A pledge to pay for the damaged goods or money is known as indemnification when one party suffers as a result of the other party losing money or things and the other party commits to reimburse him if he loses his money or things in the near future. A legal provision known as indemnity covers losses and offers protection from them. According to Section 124 of the Indian Contract Act of 1872, a contract of indemnity is one in which one party promises to protect the other party from harm brought on by the guarantor's own actions or those of third parties. According to Indian law, an indemnity contract is a limited idea because it only refers to situations where people are involved, as required by Section 124 of the Indian Contract Act of 1872. In general, the concept of a contract of indemnity is broader in English law than it is in Indian law because under English law, any matters relating to someone else's conduct as well as occasions or accidents, such as a fire or an act of God, are taken into consideration. The Law Commission stated in its 13th Report that Section 124 of the Indian Contract Act's definition of indemnity, which does not specify the various aspects of indemnity, is insufficient. The same was said about Section 125[1] of the Act, where the Indian Law again falls short by failing to address the rights of the promisee. It has occasionally been thought necessary to update Sections 124 and 125 of the Indian Contract Act 1872 to include implicit indemnification as a concept as well as different sorts of indemnity, such as losses brought on by accidents and natural disasters.

Keywords: Contract, Indemnity, Indian and British Law.

Introduction:

A legal provision known as indemnity covers losses and offers protection from them. To put it another way, it is a promise to pay money to another party in the event that they lose money or damage their property. When one party is harmed because the other party loses money or property, and the Indemnity is the term for the other party's pledge to pay for the damaged products or money in the event that the other party's client loses his money or possessions in the near future. "Indemnity can be regarded as a sub-species of compensation or damages," whereas a contract of indemnity can be viewed as a species or a type of contract. Due to the nature of the subject matter of this type of contract, the contract of indemnity falls under the category of special contracts. An indemnification contract is defined in Section 124 of the Indian Contract Act of 1872. Like with other contracts, the requirements outlined in Section 10 of the Indian Contract Act of 1872 must be met.

Concept of Contract of Indemnity:

Implied in the word, "indemnity" is "security against loss or injury". According to Section 124[2] of the Indian Contract Act of 1872, a contract of indemnity is one in which one party promises to protect the other party from harm brought on by the guarantor's own actions or those of third parties.1 A contract of indemnity, to put it simply, is a legal arrangement between two parties wherein one party promises to compensate the other for any losses incurred by the promisor or any other third party.

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[1] Section 125 – Indian Contract Act,1872

[2] Section 124 –Indian Contract Act ,1872

Illustration: Mr. A enters into a contract with Mr. B that if Mr. C is not able to pay the loan that you give to Mr. C then Mr. A will be liable to pay the loan amount. The contract between Mr. A and Mr. B is a contract of indemnity. In this case, Mr. A promises to indemnify Mr. B to pay the loan, so Mr. A is indemnifier, Mr. B is creditor and Mr. C is indemnity holder. This example helps us to understand that the contract of indemnity takes place between the principal debtor (indemnity holder) and surety (indemnifier).

Essentials of a Contract of Indemnity

- There are two parties, indemnity holder and indemnifier. Indemnifier is that person who promises to pay compensation whereas indemnity holder is that person whose loss is to be compensated.
- There should be a contract to reimburse the person for the damage incurred by the indemnifier or any other person.

Special Cases of Implied Indemnity

- In accordance with Section 69[3], a party who is interested in payment of money that another is required by law to pay and pays it themselves is deemed to be indemnified.
- In accordance with Section 145[4], a party has the right to demand indemnification from the major defaulter for any amounts that he has lawfully contributed to the guarantee.
- According to Section 222[5], the agent is entitled to indemnification from the principal for all sums paid in the proper execution of his duties.

Origin & Development of Contract of Indemnity In India:

In India, the case *Osman Jamal & Sons Ltd. v. Gopal Purshotam*[6] is where the indemnity contract first appeared. In this case, the plaintiff was as a commission agent for the defendant company. In its contract with the plaintiff company, the defendant company agreed to defend the latter in the case of any damages and engaged in the buying and selling of Hessian and Gummies. The plaintiff company bought hessian from Maliram Ramjets, but the defendant company is unable to pay for it and accept delivery of the hessian. Then, Maliram Ramjets provided the same service to others at a lower cost. Maliram Ramjets filed a claim for the loss against the plaintiff, but the plaintiff firm asked the defendant for indemnity because it was closing down. The defendant, however, objected to paying the damages and claimed that the plaintiff had stopped him from doing so. The court decided that because the defendant promised to pay back the plaintiff, he must do so.

Origin & Development of Contract of Indemnity under the English Law

The term "indemnity" has a significantly wider definition in English law than it does under the Indian Contract Act. It also covers the agreement to protect the promisor from loss, regardless of whether it was brought on by human action or another occurrence like an accident or fire. A contract of

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[3] Section 69-Indian Contract Act,1872
[4] Section 145-Indian Contract Act,1872
[5]Section 222-Indian Contract Act,1872
[6] AIR 1929 Cal 208

indemnity under English law is a contract of insurance other than life insurance. In the famous decision of Adamson V. Jarvis[7], English law gave birth to the concept of a contract of indemnification. In this case, Adamson was the plaintiff and Jarvis was the defendant. Since the plaintiff worked as an auctioneer, Jarvis, who wasn't the real owner of the livestock, gave him the cattle. The cattle were later sold at an auction. The plaintiff sold the animals by following the precise instructions Jarvis gave. After the true owner of the cattle successfully sued Adamson for conversion and was awarded damages, Adamson sued Jarvis to be made whole for the loss he endured as a result of having to pay the owner's damages. The court found that the plaintiff accepted the defendant's instructions, and as a consequence, Jarvis was ultimately obligated to compensate Adamson for any losses that may have resulted as a result. As a result, the defendant will be liable for paying damages.

The general rule of the contract of indemnity under English law is as follows:

- Only when the indemnity holder suffers a loss , the indemnifier will pay the indemnity holder.
- If the indemnity holder follows the instructions of the indemnifier.
- If the party seeking indemnification incurs any court costs or compromise payments.

Concluding Observations:

A legal release from the fines or obligations associated with any course of action is known as indemnity. In other words, if specific costs specified in the contract of indemnification are obtained by another party, one party is required to compensate the other. For instance, renting a car companies stipulate that the individual renting the automobile will be responsible for any losses or damages to the vehicle due to his or her own careless or negligent driving, and will be required to indemnify the car rental business. In England, all matters are considered where a loss occurs from any person as well as from any accident, however in India, all matters are considered if losses occur owing to the promisor himself or any other third party.

The original rule in England was that the indemnity holder would be compensated after suffering a loss, but this rule later modified, and it is currently believed that the indemnifier is liable whenever there is a chance that the indemnity holder will suffer a loss in the future.

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[7] 4 BING.66:29 R.R 503

APPLICABILITY OF SCIENTIFIC AND PSYCHO-ANALYTICAL TECHNIQUES IN CRIMINAL JUSTICE SYSTEM IN INDIA: JUDICIAL APPROACH

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Abstract: In the recent past, the infusion of Scientific and Psycho-analytical techniques in criminal investigation and trial has been a major breakthrough in the process of advancement of criminal justice in India. Police utilize these techniques to detect a crime, reconstruct the crime scene, identify and apprehend the offender, establish links of incidents, curtail unnecessary arrests, reduce response time, avoid use of third degree methods, and improve prospects of proof through scientific evidences. On the other hand, the courts take account of these physical evidences, otherwise infallible, and determine with enhanced accuracy the innocence or guilt of the offender. Somewhere, the efficiency and effectiveness of the criminal justice functioning has interwined with the extent of the use of technological tools in criminal investigations. In fact, the revelations made by the use of such scientific tests such as DNA, Finger prints etc. and during the psycho-analytical analysis have been found to be very useful in solving high-profile criminal cases of national and international ramifications namely, Godhra Carnage, Telgi Scam, Abu Salem Case, Nethari Cannibal's case, Malegaon Bomb Blasts case, Bombay 26/11 case etc. The present paper is aimed at analyzing the legislative framework with regards to applicability of the Scientific and Psycho-analytical techniques in criminal justice system in India. It also deals with the recent judicial pronouncements relating to the use of the outcomes these techniques in trial and its evidentiary value. It further suggests certain measures for improvement.

Keywords: Criminal justice, Psycho- analytical techniques, Forensic Evidence, Evidentiary value.

Introduction:

Criminal Justice forms part of the set of the processes, bodies and institutions that aim to secure or restore social control[1]. Social control is the organized ways in which society responds to behavior and people it regards as deviant, problematic, worrying, threatening, troublesome and undesirable[2]. Effective criminal justice machinery ensures a safe and peaceful society. The administration of criminal justice is mainly carried out by the police, prosecution, courts, and prisons. Amongst these functionaries, the key role is played by the courts and Magistrates. They are responsible for deciding the guilt or innocence of the alleged offenders and determining the sentence. The trial of the offenders in the court is a complex process involving appreciation of facts and evidence and establishing the charge sought to be proved[3].

Scientific and psycho-analytical techniques applied in Criminal Justice System:

In recent times, the infusion of technology popularly known as "Forensic Science" in crime investigation has been a major achievement in the process of

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[1]Francis Pakes(ed), *Comparative Criminal Justice*. (Routledge, Oxon, Third Edition/2015) at 1.

[2]David Shichor, *The Meaning And Nature of Punishment,* (Waveland Press, Inc. 2006).

[3]*Committee on Reforms of Criminal Justice System*, Government of India, Ministry of Home Affairs, Volume I,2003.

advancement of criminal justice. Forensic science is the application of science in answering question that are of legal interest. It is that scientific discipline which is directed to the recognition, identification, individualization, and evaluation of Physical, Biological, and Psychological evidence by the application of the principles and methods of natural sciences for the purpose of administration of criminal justice. It is an amalgamation of almost all faculties of knowledge and includes chief sciences of Chemistry, Physics ,Biology, Ballistics, Firearms or explosive culture, Documents, Photographies, Odontology , Serology, Geology, DNA Fingerprinting, Blood and other biological materials testing, Brain Fingerprinting, and Narcoanalysisetc[4].

During an investigation, evidence is collected at a crime scene or from a person, analyzed in a crime laboratory and then the results presented in court. Each crime scene is unique, and each case presents its own challenges[5].Forensic science plays a vital role in the criminal justice systemby providing scientifically based information through the analysis of physical evidence, theidentity of the culprit through personal clues like fingerprint, footprints, blood drops or hair. Itlinks the criminal with the crime through objects left by him at the scene and with the victim orcarried from the scene and the victim[6].After the emergence of DNA technology as a latest method of forensic science, it provides tremendous amount of information to the investigating officers that enable him to find the criminal purely from evidence which he has left at the scene of crime[7].

The Deception Detection Tests (DDT) or Psychoanalytical techniques of crime detection and investigation are those techniques which are used in reading mind of a person by investigating the interaction of conscious and sub-conscious elements of mind and bringing repressed fears and conflict into conscious mind. The technique includes Polygraph or Lie detector test, Brain mapping or P-300 test, Narcoanalysis or Truth Serum test[8]. The utility of these techniques are that criminal investigators can read the mind of accused, suspect, and witnesses of a crime without any physical torture.The results of these tests are not acceptable as direct evidence or confessions but can be used as corroborative evidence[9]. They are specially helpful in providing further leads into the investigation process and material information that the subject is likely to hide relating to the commission. As there are no express legal provisions, constitutional validity of the techniques has been challenged in the courts times and again. The legal hurdles in the use of these techniques should be removed**.**

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[4]IshaTyagi and Nivedita Grover, *Development of Forensic Science and Criminal Prosecution-India*, 2 IJSRP Vol.4 (2014).

[5]Forensic Sciences, National Institute of Justice, Office of Justice Programs, http://www.nij.gov/topics/forensics/pages/welcome.aspx.

[6]N. B. Narejo, M. A. Avais, *Examining the Role of Forensic Science for the Investigative-Solution of Crimes*, 252SURJ (SCIENCE SERIES*)* Vol. 44(2) 2012.

[7]Jyotirmoy Adhikary, *DNA Technology in Administration of Justice*, (LexisNexis, Butterworths, 2007).

[8]Reddy KSN.Forensic science Laboratory. In: The Essentials of Forensic Medicine and Toxicology. 34th ed. New Delhi: JAYPEE Publishers; 2017. p. 478-9.

[9]Haryy T. Edwards, "Solving the problems that plague the Forensic Science ommunity".ABA J. 2009; 50(1). Also see: SenthilKumaran M, Sarma B, Arun Kumar S et.al. Deception detection tests: a subdued investigating tool, *International Journal of Research and Review*. 2021; 8(11): 419-422.

Legislative and Constitutional Framework and Relevant Judicial Pronouncement:

In India, the application of forensic science to crime investigation and trial predominantly involves the following questions:
a) What is the constitutional validity of such techniques?
b) To what extent does the law allow the use of forensic techniques in crime investigation?
c) What is the evidentiary value of the forensic information obtained from the experts?

Articles 20(3) of the Indian Constitution provide that no person accused of any offence shall be compelled to be a witness against himself. Article 20(3) is based upon the presumption drawn by law that the accused person is innocent till proved guilty. It also protects the accused by shielding him from the possible torture during investigation in police custody. Criminal law considers an accused as innocent until his guilt is established beyond reasonable doubt. Article 20 (3) is a protective umbrella against testimonial compulsion in respect of personsaccused of an offence to be witness against themselves. The protection is available not only in respect of evidence given in a trial before Court but also at previous stage. The protection against self incrimination envisaged in Article 20 (3) is available only when compulsion is used and not against voluntary statement, disclosure or production of document or other material[10]. This right ensures that a person is not bound to answer any question or produce any document or thing if that material would have the tendency to expose the person to conviction for a crime.

The Supreme Court judgment in the case of *Selvi & Others v. State of Karnataka & another*[11], stated that DDTs could not be performed without consent. It also raised the serious concern of violation of the Right against self-incrimination enumerated in Article20 (3) of the Constitution. The right to life and personal liberty given under Article-21, was further interpreted to include 'Right against cruel, inhuman or degrading treatment. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872[12].

Art.20 (3) is connected with some of the provisions of the Indian Evidence Act,1872 and the Code of Criminal Procedure , 1973. The sections 24,25,26,27 and 73 of the former and sections 53, 53A,54,91,156(1),161(2),164,and 313(3) of the later is relevant in this regard. The doctrine of 'excluding the fruits of poisonous tree' has been incorporated in sec.24,25,26 of the IEA, 1872 which read as follows:

Sec.24. Confession caused by inducement, threat or promise when irrelevant in criminal proceedings: A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat for promise, having reference to the charge against the accused person, proceeding from a person in

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[10] U.C. Shrivastava, *Immunity from Self-Incrimination under Art. 20(3) of the Constitution of India*, JJTRI, U.P., http://ijtr.nic.in/articles/art19.pdf (last visited on 8.2.2016).
[11]AIR 2010 SC 1974.
[12] Math SB. Supreme Court judgment on polygraph, narco-analysis & brain-mapping: a boon or a bane. Indian J Med Res. 2011;134(1):4-7.

authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Sec.25. Confession to police officer not to be proved: No confession made to a police officer shall be proved as against a person accused of any offence.

Sec.26. Confession by accused while in custody of police not to be proved against him: No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate,shall be proved as against such person.The sec 27 incorporates the " theory of confirmation by subsequent facts" The section reads as : Sec. 27. How much of information received from accused may be proved: Provided that when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether if amounts to a confessions or not, as relates distinctly to the fact thereby discovered, may be proved.

Sec. 73 of the Indian Evidence Act empowers the court to direct any person including an accusedto allow his finger impressions to be taken. The Supreme Court has also held that beingcompelled to give fingerprints does not violate the constitutional safeguards given in Art.20(3).sec73 reads as follows:

Sec. 73 Comparison of signature, writing or seal with others admitted or proved: In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

While answering the question as to whether forensic evidence violates Art. 20(3) of Indian Constitution the Supreme Court of India in *The State of Bombay v. Kathi Kalu Oghad & Others*[13], it held that giving thumb impression, specimen signature, blood, hair, semen etc. by the accused do not amount to 'being awitness' within the meaning of the said Article. The accused, therefore, has no right to object toDNA examination for the purposes of investigation and trial. The Bombay High Court in another significant verdict in the case of *Ramchandra Reddy & others v. State of Maharashtra*[14], upheld the legality of the use of P300 or Brain finger-printing, liedetector test and the use of truth serum or narco analysis. The court upheld a special court order allowing SIT to conduct scientific tests on the accused in the fake stamp paper scam including the main accused, Abdul KarimTelgi. The verdict also maintained that the evidence procured under the effect of truth serum is also admissible. In *Dinesh Dalmia v. State*[15], the Madras High Court held that subjecting an accused to narco-analysis does not tantamount to testimony by compulsion. However, in a subsequent case namely *Selvi & Others v. State of Karnataka & another*[16] the Supreme Court questioned the legitimacy of the involuntary administration of

[13] AIR1961 SC 1808,1962 SCR(3)10.
[14]2004 All MR (Cri) 1704.
[15] 2006 Cri. L. J 2401.
[16] Supra note 11.

certain scientific techniques for the purpose of improving investigation efforts in criminal cases. In that casethe apex court held that brain mapping and polygraph tests were inconclusive and thus their compulsory usage in a criminal investigation would be unconstitutional.

The Code of Criminal Procedure, 1973 was amended in 2005 to enable the collection of a host of medical details from accused persons upon their arrest. Section 53 of the Criminal Procedure Code 1976 provides that upon arrest, an accused person may be subjected to a medical examination if there are "reasonable grounds for believing" that such examination will afford evidence as to the crime. The scope of this examination was expanded in 2005 to include "the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case." However, the provision inserted through an Amendment in 2005 is limited to rape cases only. This section also does not enable a complainant to collect blood, semen, etc, for bringing criminal charges against the accused; neither does it apply to complaint cases[17].In similar lines, Section 164A Code of Criminal Procedure, 1973 provides for the medical examination of a woman who is an alleged victim of rape within twenty four hours and such examination includes the DNA profiling of the woman. Both the sections authorize any medical practitioner within themeaning of Sec. 2(h) Indian Medical Council Act, 1956 to collect a DNA sample. The relevant provisions of the Criminal Procedure Code, 1973 in this regard are-

> *Sec.53.Examination of accused by medical practitioner at the request of police officer.*- (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
> (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.
> *53A. Examination of person accused of rape by medical practitioner.*-(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

[17]Supra, n. 7.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section.

Sec. 54. Examination of arrested person by medical officer.-(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.

Sec 91. Summons to produce document or other thing: (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

Section 156. Police officer's power to investigate cognizable case: (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

Section 161. Examination of witnesses by police: (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

> *Section 164. Recording of confessions and statements*: (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
> Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force
> *Section 313 Power to examine the accused*: (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

Restrictive use of Forensic Evidence in Indian Legal Scenario:

Under Indian Evidence Act, 1872, forensic report is considered as "opinion" tendered by expert. The credibility of an expert witness depends on the reasons stated in support of conclusion and the tool technique and materials, which form the basis of such conclusion.However, the court is free to disagree with the conclusions drawn by the expert and rely on other evidences for the purpose of decision. The National Draft Policy on Criminal Justice Reforms, July, 2007 has suggested that Indian Evidence Act needs to be amended to make scientific evidence admissible as 'substantive evidence' rather than 'opinion evidence' and establish its probative value, depending on the sophistication of the concerned scientific discipline[18]. The Committee on Reforms of Criminal Justice System also indicated that the present level of application of forensic science in crime investigation is somewhat low in the country, with only 5-6% of the registered crime cases being referred to the FSLs and Finger Print Bureau put together[19]. There is urgent need to bring about quantum improvement in the situation as the conviction rate is consistently falling over the years in the country and the forensic evidence, being clinching in nature, can reverse the trend to some extent.

In India the area of forensic science has not been fused with the existing criminal justice frameworks. More often neither the judge northe lawyer nor even the police appreciate fully the advances or the extensive, promising potentialities of the science and the fusion of new technologies, methodologies, modalities andresearch. The Report of the Committee on Draft National Policy on Criminal Justice emphasized thattraining, accreditation, standard setting, professionalism and research and development offorensic science should receive adequate attention in the policy framework. The Malimath Committee also suggested that more well-equipped laboratories should be established to handleDNA samples and evidence, as well as specific law should be enacted giving guidelines to thepolice setting uniform standards for obtaining genetic information and creating adequatesafeguards to prevent misuse of the same. More recently, the Justice Verma Committee laiddown the need for proper storage and preservation of DNA samples, especially in sexual assaultcases[20].

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[18]Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs, Government ofIndia, July, 2007.
[19]Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Report,Volume 1, March 2003.
[20]Report of the Committee on Amendments to Criminal Law, 23rd January, 2013.

Concluding Observations:

In Indian scenario, there has been increased emphasis on the use of such technologies in criminalinvestigation and trials. The Commissions appointed on reforms of criminal justice have reiterated that the infusion of technology in crime detection can help the system to function efficiently. The relevant laws have been amended from time to time to make way for use of forensic technologies in crime investigation and trial. Yet, it may be said that there are existent flaws in the laws which need to be addressed. The courts are also reluctant to rely on scientific evidence due to their restrictive approach, or certain inherent defects in the evidence as producedin courts which deter them from relying on it entirely. The main motto of criminal justice system is to provide fair justice. Undoubtedly, forensic evidence is more authentic than ocular evidence. Forensic science being scientific evidence is a boon for criminal justice system. We have toovercome the existing flaws to step forward.

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INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS AND ITS DEFENSES

Dr. Anand Kumar Dwivedi*

Abstract: Intellectual property right provide certain exclusive rights to the inventors or creators of that property in order to enable them to reap commercial benefits from their Creative efforts are reputation. Intellectual property rights refer to the legal protection accorded to certain inventions or creations of the mind. Intellectual property has increasingly assumed a vital role with the rapid pace of technological, scientific and medical innovation how a day. The main motive of intellectual property laws is to encourage the creation and Production of a wide variety of Intellectual goods.
Keywords: Intellectual Property Right, Patent, Copyright, Trademarks, Infringement, Defenses.

Introduction:

Human beings are superior from other living creatures because they possess intellect. Creative genius of human being creates intellectual property which in turn, when properly exploited can earn wealth. Since it is essentially a creation of mind therefore it is called intellectual property-inventions, Industrial designs, literary and artistic works, Symbols used to promote Commerce are some commonly known forms of Intellectual property[1]. IPR have been defined as ideas, inventions and creative expression based on which there is a public willingness to bestow the status of property. Intellectual property is about promoting progress and innovation. Patents, Copyrights, Geographical indication, Trademarks, industrial design and trade secrets are the most common forms of Intellectual property rights. Intellectual property rights refer to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention for a given period of time[2]. Intellectual property is a category of property that includes intangible Creations of the human intellect. There are many types of intellectual property and some countries recognise more than others. The most well-known types are Copyright, Patent & Trademark.

Violation of Intellectual Property Laws[3]:

An Intellectual property infringement is the violation or breach of an intellectual property right. Infringement occurs in various situations. A harm to one's right is an infringement. A violation of a statute is also an infringement. IPR infringement refers to the unauthorized use, duplication or Sole of materials or products that are legally regarded as protected Intellectual property. Intellectual property infringement is violating an owner's exclusive rights to intangible assets such as musical, literary, or artistic works. Copyright infringement is the use of works under copyright, including reproducing,

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[1] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/

[3] https://www.legalserviceindia.com/legal/article-6623-defences-against-infringement-of-intellectual-property-law.html

distributing, displaying or performing the copyrighted work without permission. Patent infringement, using or selling a patented invention without permission from the patent holder, typically for commercial purposes. Trademark infringement, a violation of the exclusive rights attaching to a trademark without the authorization of the trademark owner or licensees. In a commercial contract, an infringement happens when one of the contracting parties breaches the terms stated in the contract. Intellectual property rights are infringed when a document protected by IP Laws is used, copied or other exploited without having the proper permission from person who owns the a original rights.[4]

Proving infringement usually requires valid copyright, trademark or patent in place. It also requires evidence that the defendant used the material, artistic work, or invention without notifying the person who has ownership rights in the material.[5]

Defences against infringement of Intellectual Property Laws:

In civil proceedings and the criminal Prosecutions under common law a defendant may put up a defense in an attempt to avoid criminal or civil liability. Other than contesting the accuracy of any allegation made against them in a criminal or civil proceeding, a defendant may also make allegations against the plaintiff or raise a defense, arguing that even if the allegations put up against the defendant are true. The defendant is nevertheless not liable for the same. Likewise, there are few defenses in the intellectual property. Depending on the facts of the case available to the court, there can be some legal defenses to infringement.

A common defense to infringement is that of "consent." If the defendant can establish that the plaintiff agreed to the use of the material, it may deliver a defense. This can be a convincing argument, primarily if the defendant supplied payment for the usage. Another defense is that the copyright, trademark, or patent has expired. These protections may expire over time, often without the individual knowing that the copyright has expired. If this is the circumstance, it will be difficult for the plaintiff to assert their legal rights.[6]

Infringement of Copyright[7]:

The owner of a copyright has the monopoly right to exploit his work for commercial gains in multifarious ways. The nature of rights depend on the nature of work. As per the Copyright Act, 1957, the use of a copyrighted work without the permission of the owner results in copyright infringement. Infringement occurs when a third person unintentionally or intentionally uses/copies the work of another without giving credit. It is usually classified into two categories, i.e. primary and secondary infringement. Primary infringement occurs when there is an actual act of copying, while secondary infringement occurs when unauthorised dealings take place, such as selling or importing pirated books, etc. In the case of secondary infringement, the infringer will know

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[5] https://www.legalmatch.com/law-library/article/what-is-infringement.html
[6] https://www.legalmatch.com/law-library/article/what-is-infringement.html
[7] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

about infringement, while in the case of primary infringement, the infringer may or may not know about infringement.

Copyright infringement is the use or production of copyright-protected material without the permission of the copyright holder. Copyright infringement means that the rights afforded to the copyright holder, such as the exclusive use of a work for a set period of time, are being breached by a third party. Music and movies are two of the most well-known forms of entertainment that suffer from significant amounts of copyright infringement. Infringement cases may lead to contingent liabilities, which amounts set aside in case of a possible lawsuit.

Infringement of Patent[8]

Patent infringement means the violation of the exclusive rights of the patent holder. Violation of a patentee's right with respect to some invention is known as patent infringement. When the rights of the patent holder or the claims in the patent are violated by a third party, without the consent or license of the patent holder, such third party is said to have infringed the patent rights of patent holder. While doing a patent infringement risk analysis, it is necessary to understand the types of patent infringements to ensure that the invention is not likely to infringe any of the existing patent rights.

Infringing a patent means manufacturing, using selling or importing a patented product or process without the patent owner's permission. The owner of a patent can take legal action against you and claim damages if you infringe their patent. Sections 104-114 of the patents Act, 1970 provide guidelines relating to patent infringement.

Defenses of Patent Infringement[9]

Defenses to patent infringement are given under section 60(5) of the patents act 1977. In general it is permissible to use a patent if it is done privately and for non-commercial purpose. Also patent laws in most European countries include a "research exception" or "research exemption" which permits use of a patented invention for experimental purpose without infringing the rights of the holder. It is likely that the experimental use defense is becoming increasingly important as patenting (particular in relation to bio-technology) enters the traditional domains of pure scientific research carried out within universities.

Infringement of Trademark[10]:

The Trademarks are protected under the Trademarks Act, 1999. The Trademark Act, 1999, provides for the provisions dealing with protection, Registration, and penalties for Infringement regarding the Trademarks in India.. The Trademarks across the globe are given the status of intellectual property. There are many organisations, both international and national, that endeavour

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[8] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

[9] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

[10] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

to protect intellectual properties such as trademarks. The Indian Patent Office is the organization in India which is working for the protection of Trademarks.

Infringement of trademarks as per Section 29 of the Trademarks Act, 1999 is defined as a use of a mark, by an unauthorised or an authorised person or a person who is not the registered proprietor, which is identical or deceptively similar to the trademark in relation to the goods or services in respect of which the trademark is registered. In simple words, it is defined as the violation of exclusive rights that are attached to a registered trademark without the permission of the registered owner or licensees. The courts have time and again assumed that similarity of two marks and the kind of goods and services results in causing confusion in the minds of general public. They may take an undue advantage of enjoying the hard-earned reputation of the registered trademark. In order to have a successful claim against a person infringement of trademark, what needs to be proved is that the infringing trademark is deceptively similar or identical to the registered trademark.[11]

Section 29(9) of the Indian Trade Marks Act, 1999, states that the infringement can also be done by the spoken use of those words as well as by their visual representation[12]. Sub-sections of the Section 29 of the Indian Trade Marks Act, 1999, describes that in course of the use of the trademark it is said to be infringing the right of the other company due to use of similar or identical trademark using for marketing of similar kinds of goods and services or use of identical or deceptively similar trademark for any kind of goods and services.[13]

Trademark infringement happens when an infringer uses it without the permission of its owner for commerce or to deceive the common public and create confusion with the registered trademark. Trademark infringement is defined as the unauthorized use of a trademark or service mark. This use can be in connection with goods or services and may lead to confusion, deception, or a misunderstanding about the actual company a product or service came from. Furthermore, Trademark infringement can also be caused by an advertisement. The advertisement should take unfair advantage of the registered trademark and also damages the reputation and uniqueness of the registered trademark. If the visual representation and spoken use of certain words affect the uniqueness of a registered Trademark, then it will amount to Trademark Infringement. Trademark owners can take legal action if they believe their marks are being infringed. If infringement of a trademark is proven, a court order can prevent a defendant from using the mark and the owner may be awarded monetary relief.

Defenses of Trademark Infringement[14]:

Trademark law is equitable and utilizes the traditional equitable defenses with the added element of a presumption favoring the registrant for trademarks that are registered under the Lanham Act. In addition to the equitable doctrines

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[11] https://blog.ipleaders.in/what-is-infringement-of-trademark/

[12] https://www.legalserviceindia.com/legal/article-10260-trademark-infringement-and-their-defenses-in-india.html

[13] https://www.legalserviceindia.com/legal/article-10260-trademark-infringement-and-their-defenses-in-india.html

[14] M. K. Bhandari, *Law Relating to Intellectual Property Rights*. Second Ed. (Allahabad: Central Law Publication).

of caches, estoppel and unclean hands, an alleged infringer may assert the defenses of fair use and collateral use.

Effects of IP Infringement in India:

Intellectual property Infringement is basically using someone else's Intellectual property without the consent of the owner of that Intellectual Property. When a person acts *ultra vires*, he is breaching the law. Infringement is "a crime less serious than a felony". Here intellectual property infringement could be trademark infringement, copyright infringement, patent infringement etc. IP laws in India are governed and protected under the Patents Act, 1970, Trademarks Act, 1999, Copyrights Act, 1957, etc. Civil and Criminal remedies mentioned under these acts are of extreme importance for the IP rights enforcement. In this situation, the principal function of the judiciary is to provide legal remedies against infringement of personal and property rights of persons. Infringement of intellectual property rights is considered as tortious aggression of property .The courts in India have the power to grant reliefs in cases relating to the violation and/or infringement of intellectual property rights. The judiciary not only does the adjudication of the intellectual property matters but it also explains several IP statutes for better understanding. The various IP laws in India mention the provisions of civil and criminal remedies for IP rights enforcement. These civil and criminal remedies are specific and independent. Also, they can be availed simultaneously[15].

Concluding Observations:

Intellectual property Rights play a very important role in each sector and have also become the basis for vital decisions of investment. There are several types of Intellectual property Protection like Patent, copyright, trademark etc. Patent is recognition for an invention which satisfies the criteria of global novelty, non-obviousness and industrial application. It is very well settled that Intellectual property play a crucial role in the modern economy. Intellectual property is a strong tool, to protect investments, time and money. Thus Intellectual property right in this way aids the economic development of a country by promoting healthy competition and encouraging industrial development and economic growth.

Intellectual property rights are like any other property right. They allow creators or owners of Patents, trademarks or copy righted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights which provides for the right to benefit from the protection of moral and material, Interests resulting from authorship of scientific, literary or artistic productions. An efficient and equitable intellectual property system can help all countries to realize intellectual property's potential as a catalyst for economic development and social and Cultural well-being. IPR is a strong tool to protect investment, time and money.

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[15] https://www.intepat.com/blog/consequences-ip-infringement-india/

RIGHTS OF ARRESTED WOMEN IN INDIA: AN ANALYTICAL STUDY

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Female suspects should not be kept in police lock up in which male suspects are detained.

-Hon'ble P. N. Bhagwati, J.[1]

Abstract: The Indian criminal justice system has adopted the principle of innocence which presumes every accused person to be innocent unless and until he/she is not held guilty by a competent court, complying the requirements of fair trial. Accordingly, every person against whom there is any criminal charge has been authorized to exercise his rights except only few. Such legal protection has been granted to every accused person without any discrimination. In this paper, a detailed analysis has been made in respect of rights granted to woman who has been arrested in respect of any criminal charge.
Keywords: Women, Arrest, Crime, Rights, Constitution of India, CrPC.

Introduction:

The women are not considered only the protector and producer of this world rather their presence is very much required for a peaceful, prosperous and sustainable world. They have played very vital role in development and growth of humanity. Because of their presence, the worldly activities are being conducted successfully. Currently, they have broken the traditional social boundaries and have entered in every walk of life. Even their presence can be felt in those areas also which were earlier completely occupied by male community. They are called the ocean of affection, kindness and happiness. But, there may be some cases wherein they are charged with criminal liability. The law has provided safeguards to every person who has been arrested by the police but in case of arrest of women, the additional safeguards are also there.

Rights of Arrested Women:

Every arrested person, men and women, have been given legal protection contained in the Constitution of India as well as in the Code of Criminal Procedure in addition to various judicial pronouncements made by the Indian Judiciary. In *D.K. Basu v. State of West Bengal*[2], the Supreme Court has laid down the principles to be followed by the police while making arrests as under-

> 1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
> 2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
> 3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock- up, shall be

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[1] *Sheela Barse v. State of Maharashtra*, 1983 SCR (2) 337.

[2] (1997) 1 SCC 416.

> entitled to have one friend or relative or other person know to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
> 4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
> 5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
> 6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next fried of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
> 7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
> 8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a penal for all tehsils and districts as well.
> 9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illega Magistrate for his record.
> 10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
> 11. A police control room could be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

The above-mentioned directions of the Supreme Court have been inserted in the CrPC through amendments. Some of the rights guaranteed, in general to every accused person including women, are discussed below-

1. Right to Know the Ground of Arrest-Every arrested person has the right to know the justification of his arrest. The major elements of crimes are mens rea, actus rea, and injury. Actus Rea, which implies method of conduct of crime, and harm, which is against whom, at what location, and at what time the act has been done, the arrested person must have information about it. Article 22 of the Indian Constitution provides protection against arrest and detention in certain cases, which provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. The Supreme Court held in *Joginder Kumar v. State of U.P.*[3] that a person who has been detained has the right to disclose his detention to any friend, relative, or family member. While taking the detained individual to the police station, the police officer must also explain the person's rights to him.

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[3] AIR 1994 SC 1349.

Section 50 CrPC provides that a person arrested must be informed of the grounds of arrest and his right to bail. It further says that if a police officer arrests a person without a warrant, he shall communicate with him about the offence. Section 55 provides that the senior official authorises the junior official to make an arrest and specifies the grounds for doing so. The arrested individual must be aware of the delegation of power.

Moreover, Section 75 CrPC says that the arrestee must be informed of the details of the warrant's execution by the police officer or other person, and if necessary, they must also show him the warrant.

In the case of *Ram Bahadur v. State of Bihar*[4], it was held that the justifications should be stated clearly and directly, leaving nothing for misunderstanding. The Bombay High Court observed that the reason for the arrest should be explained in a language that the suspect can understand[5]. Therefore, if the subject matter of warrant is notified, the arrest would be unlawful[6].

2. Right to be Informed about the Bail-According to sub-section (2) of Section 50 CrPC, it is the duty of the police officer to inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. When someone is detained without a warrant for a non-cognizable offence, they have the right to be released on bail by providing sureties.

3. Right to Consult a Legal Practitioner-The right to consult a legal practitioner is a fundamental right for an arrested person. Article 22(1) of the Indian Constitution provides that it is the right of the arrested person to have legal advice from a legal practitioner. In a case the Supreme Court[7] observed that the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair, and just.' Free legal services to the poor and needy are an essential element of any 'reasonable, fair, and just' procedure. A prisoner who is to seek his liberation through the court's process should have legal services available to him. Similarly, Section 41D of the Cr.P.C. says that when any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation. One more section of the Code clarifies that any person who is charged with an offence and appears before a criminal court has the right to be defended by a pleader of his choice.

4. Right to be Examined by Medical Practitioner-Sections 53 and 54 of the Code provide for the examination of an accused by a medical practitioner at the request of a police officer. Section 53 says that when a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order

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[4] AIR 1975 SC 223.
[5] *Harikishen v. State of Maharashtra,* (1962) 64 BOMLR 522.
[6] *Satish Chandra Rai v. Jodu Nandan Singh*, (1899) ILR 26 Cal 743.
[7] *Hussainara Khatoon v. State of Bihar,* AIR 1979 SC 1369.

to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose. Further another section provides that an arrested person has the right to have a medical examination by the medical officer who is working for the Central and State government. But if there is a female arrestee, then the body must only be examined by or under the supervision of a woman medical officer; if she is not available, a woman certified medical practitioner must do so. Further, the medical practitioner must prepare the record of such an examination, mentioning therein any injuries or marks of violence upon the person arrested and the approximate time when such injuries or marks may have been inflicted. After a medical examination, the medical officer has to furnish a copy of the report of the examination to the arrested person or the person nominated by the arrested person.

5. Right to be Produced before Magistrate without Delay-Every arrestee must appear before a magistrate. The provisions of the right to be produced before a Magistrate without delay are provided under the Indian Constitution and the Code of Criminal Procedure, 1973. Under the Indian Constitution, Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. Similarly, under Section 57 of the CrPC, it is said that a person arrested is not to be detained for more than twenty-four hours unless there is a reasonable ground for it.

Section 76 of the Code says that the police officer or other person executing a warrant of arrest shall without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person- Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Additionally, in particular, the arrested women have been guaranteed the following rights-

1. Arrest before Sunset and after Sunrise-Unlike the male accused, the women cannot be arrested during night time in normal conditions. The relevant provisions are given in sub-section (4) of Section 46 as follows-

> "(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

Section 46 (4) of the Criminal Procedure Code, 1973, enumerates that the woman must not be arrested before sunset or after sunrise. However, if we read Section 46(4) of the Code carefully, it says "save in exceptional circumstances," which means this section provides an exception to this general rule. Women can only be arrested before sunset and after sunrise if exceptional circumstances exist. The female police officer must make a written report and obtain prior permission from the Judicial Magistrate First Class; this does not include the Executive Magistrate.

In *State of Maharashtra v. Christian Community Welfare Council of India*[8], the Supreme Court observed and agreed with the purpose behind forbidding the arrest of a woman between the hours of sunset and sunrise, but it was of the opinion that strict compliance with such restrictions in a particular situation could present challenges for the investigating agency and even provide room for dishonest accusers to evade the legal system.

In *Salma v. State of Tamil Nadu*[9], Justice Anita Sumantha said in para 35 of the judgement that-

(i) there is an absolute bar generally as against the arrest of a woman prior to sunrise and after sunset on any given day. Legislature has noted the possibility of exceptional circumstances and has carved out an exception in such situations.

(ii) In the presence of exceptional circumstances, a woman may be arrested prior to sunrise and after sunset,
   a) in the presence of a woman police officer, and
   b) after submission of a written report to the jurisdictional Judicial Magistrate of First Class, who has to permit the same.

It is, therefore, evident that in this case, a woman can only be arrested by a female police officer and only upon the submission of a written complaint to the relevant Judicial Magistrate First Class.

2. Arrests only by the Female Police Officer-A woman can only be arrested by a female police officer; a male police officer has no right to do so. The proviso of sub-section (1) of Section 46 of the Code provides that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

It is, therefore, crystal clear that a female police officer, not a male police officer, has the authority to detain a woman. Only a female police officer is permitted to physically touch a woman in order to arrest her; the police officer is not permitted to do so. However, in extremely rare circumstances, a male police officer may be able to conduct an arrest of a woman if a female police officer is not present. There is no requirement for a female police officer in an emergency.

The Supreme Court went on to say that it was necessary to protect the female sought to be arrested by the police from police misdeeds but it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises.[10]

3. The officer should obtain approval from the Judicial Magistrate First Class-According to Section 46(4) of the Code, a female police officer must submit a written report and obtain prior permission from the Judicial Magistrate First Class in whose local jurisdiction the offence is committed or the arrest is to be made in order to make an arrest of a woman between the hours of sunset and sunrise.

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[8] AIR 2004 SC 7.
[9] WP.No. 29972 of 2015 decided on 26 September, 2012 (Madras).
[10] *State of Maharashtra v. Christian Community Welfare Council of India*, AIR 2004 SC 7.

In *Rajinder Singh v. State of NCT of Delhi*[11] it was observed that arrest of a woman is not to be effected after sunset and before sunrise except under exceptional circumstances. Even in those exceptional circumstances, if a woman is to be arrested between sunset and sunrise, a written permission is to be obtained from the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

4. A Male Police Officer must not conduct the search of a woman-Sub-section (2) of Section 51 of the Code provides that if it becomes essential to search a female, a female police officer must do it while adhering strictly to decency. In the case of *Amina v. Circle Inspector of Police*[12], the court observed that the authorised officer, even though he is male, should oversee and supervise the female officer in the case of a female offender, but she should do it under his command.

5. Examination of Women by Medical Practitioner-According to Section 53(2) of the Code, a female medical practitioner must conduct the arrestee's medical examination whenever the arrested person is a female.

Another provision related to the examination of women by medical practitioner is the examination of a person accused of rape, which is given under Section 53A of the Cr.P.C. In the case of *Veerendra v. State Of Madhya Pradesh*[13], the Supreme Court observed that Section 53A(1) of Cr.P.C., provides for a detailed examination of a person accused of an offence of rape or attempt to commit rape by a registered medical practitioner employed in a hospital run by the government or by a local authority, and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner. Further, it is said that the non-conduct of DNA profiling in terms of the provisions under Section 53A of the Cr.P.C. is a flaw in the investigation.

In a case Supreme Court held that DNA is scientifically substantial evidence and prevails over conclusive proof under Section 112 of the Indian Evidence Act.[14]

In addition, Section 54 of the Code mandates that a woman's medical examination be performed by a female medical practitioner who works for the Central or State Governments; if the female medical practitioner is not present, the female registered medical practitioner must examine the female arrestee.

6. Lock-up of Arrested Women-In accordance with the provisions of Section 57, CrPC, a police officer may not detain an arrested person longer than 24 hours in his custody, except in cases where doing so would violate the law; in the case of a woman, procedures for her custody must be made with strict adherence to decency; and in accordance with moral standards, arrested men and women cannot be kept in the same lockup, keeping in mind the modesty of a woman.

The Supreme Court held that it is the responsibility of the police officer conducting the arrest to ensure that women are held separately from men at the

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[11] W.P(CRL) 207, 209 & 122/2015 decided on 18 December, 2015.
[12] 2001 (2) ALT Cri 546.
[13] Criminal Appeal Nos. 5 & 6 of 2018 decided on 13 May, 2022.
[14] *Nandlal Wasudev Badwaik v. Lata Nandlal Badwaik*, Criminal Appeal No. 24 of 2014 decided on 6 January, 2014 (SC).

police station's female holding area. Arrested women should be maintained in a separate room if there is no separate lockup.[15]

7. Safeguards for Pregnant Women-According to the law, a pregnant woman can be taken into custody. On the other hand, the rule of law allows pregnant women significant safeguards to ensure both their health and the well-being of the unborn child. Under Section 416 of the CrPC, it is said that if a pregnant woman who has been given a death sentence is discovered to be pregnant, the High Court must reduce the sentence to life imprisonment.

8. The court can grant bail to arrested women in non-bailable offences- Under Section 437 of the Code, it is provided that the court can grant bail even if that offence is a non-bailable offence. This section says that the courts will grant bail to a person if they are:

(a) Suffering from any serious ailment, or
(b) A woman, or
(c) Under the age of 16.

The *High Court of Karnataka*[16] held that it is against the law to provide bail in cases where the penalty is death or a life sentence. When granting bail to a woman accused of murdering her husband, a single judge, *Justice M. Nagaparasannna*, took note of this. It was further decided that in exceptional situations, if the legislation so provides and the facts of the case are so horrific that the offence is serious, it may be reasonable not to grant bail.

In the case of *Mara Manohar v. State of Andhra Pradesh*[17], it was determined that bail with conditions may be granted whenever there has been significant progress in the investigation of a case.

Concluding Observations:

Taking into account the status and condition of women, law has provided sufficient safeguards to arrestee women beginning from recognizing their rights up to implementing their rights in true sense. At the same time, the agencies making arrest must be made aware about the special provisions enacted for women. Generally, it is found that the police do not take decent steps towards arresting a woman. Such conduct is not only in violation of legal provisions rather it is against the human rights of an individual also. Though, from time to time, the Indian Judiciary has issued directions and guidelines relating to arrests but at the ground level its enforcement in strict terms are remaining. The police organization must organize workshops with the help of judicial officers and academicians to train the police personnel so that they may discharge their duties following the legal mandate.

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[15] *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378.
[16] *Nethra v. State of Karnataka*, Criminal Petition No. 2306 of 2022 decided on 12 May, 2022 (Karnataka).
[17] Criminal Petition No. 2731 of 2022 decided on 25 April, 2022 (Andhra Pradesh).

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